

2007-(BO3)-GJX-2365-BOM

Navyug Welfare Society And Others, Appellants

Vs.

The Municipal Corporation Of Greater Bombay And Others, Respondents.

Court :

Decided On :

September 12, 2007

Judge(s) :

S R Sathe

Judgment :

NAVYUG WELFARE SOCIETY AND OTHERS, APPELLANTS v. THE MUNICIPAL CORPORATION OF GREATER BOMBAY AND OTHERS, RESPONDENTS.

Appeal From Order No. 295 of 2006 in Notice of Motion No. 4803 of 2005 in L.C. Suit No. 558 of 2006, dated September 12, 2007.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Counsel : S/Shri Anil C. Singh, D. R. Shah, Shri M. M. Vashi - Appellants.

Smt. Geeta Jogalekar, S/Shri V. B. Naik, Vivek Kantawala - Respondent.

ORDER

The Appellants - original Plaintiffs in L.C. Suit No. 558 of 2006 have preferred this appeal against the order passed by the Judge, City Civil Court, Bombay in Notice of Motion No. 4703 of 2005 whereby Plaintiffs' application for temporary injunction restraining defendants from demolishing the suit garages was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

The brief facts giving rise to this appeal are as under :-

Plaintiff No. 1 is a Society registered under the Society's Registration Act. Plaintiff Nos. 2 to 6 are office bearer of Plaintiff No. 1 Society. There are basement garages behind Darya Mahal, 80 Nepeansea Road, Mumbai 400 006. There are 60 garages in the last two rows of Darya Mahal and the said garages are abutting to the seashore. The present Plaintiffs are occupants of some of the said garages and according to Plaintiffs, they have filed the present suit in representative capacity, representing all the occupants of the basement garages. The defendant No. 1 is the municipal corporation of greater Bombay (as MCGB) The defendant Nos. 2 to 6 are the owners of the land and structure where the above mentioned suit garages are situated. The defendant No. 7 is Secretary of administrative committee, Darya Mahal, Basement Garages. As they had filed caveat Plaintiffs joined them as defendant No. 7.

On 12/11/2005, the MCGB issued notice under section 354 of the Bombay Municipal Corporation Act (the said Act) to the defendant Nos. 2 to 6 the owners of the basement garages as well as to the defendant No. 7 and occupants of garages namely Navyug Welfare Society and informed them that the suit garages are in ruinous condition, likely to fall and the same are dangerous to the occupants as well as to the passersby and as such the said garages be pulled down. The MCGB also asked them to take all necessary precautionary steps while carrying out the work of demolition of the said garages. They were also informed that if they fail to comply the notice within 30 days they would be liable for the prosecution as per Section 475A of the said Act.

In view of the above notice, Plaintiffs filed L.C. Suit No. 558 of 2006 for declaration that the notice issued by MCGB is illegal, bad in law and for permanent injunction restraining defendant No. 1 MCGB from acting in pursuance of the said notice. Plaintiffs alleged that the suit notice has been issued by MCGB at the instance of the landlord and defendant No. 7 because landlords are interested in evicting Plaintiffs and other occupants of the garage and to erect multistoried building at the same place or to use the said place for some other purpose and the action of the MCGB is not bona fide. They also prayed for appointment of Commissioner to visit the suit site and to submit report regarding the condition of the suit garages. Plaintiffs filed above mentioned Notice of Motion and prayed that temporary injunction be issued against the defendant No. 1 MCGB restraining them from demolishing the suit garages till the disposal of the suit.

The defendant No. 7 filed its affidavit in reply and contended that Plaintiffs are illegal occupants of the garages in question and they have filed the present suit only with a view to retain their possession of the said garages. The plot on which the suit garages are constructed is owned by the Collector, Mumbai and the same has been leased out to defendant Nos. 2 to 6. As per the stipulation of the said lease deed, the garages are permitted to be used only for the parking vehicle. However, the same are

being used for other purpose i.e. for residence by the occupier who have in fact no legal right to occupy the same. According to defendant No. 7 the Plaintiffs and other occupants of the garages are not even paying rent or any other charges either to the owner or to defendant No. 7 who is managing the suit garages. The defendant No. 7 also contended that the suit garages are in dilapidated condition and the same are dangerous and may fall at any time and as such notice issued by the defendant No. 1 MCGB is legal and correct. They also denied Plaintiffs allegation that MCGB has issued notice at the instance of the landlords and defendant No. 7.

During the pendency of the Notice of Motion as per the request of the Plaintiffs the Trial Court appointed Business and Industrial Consultants as Court Commissioner to visit the suit site and to report about the condition of the suit garages. Accordingly, Commissioner carried out the commission work in presence of the parties to the suit and submitted report dated 05/01/2006. The commissioner reported that the suit garages are in dilapidated and ruinous condition and likely to collapse at any time and it may result in major accident causing loss of many lives.

After hearing the arguments of the learned Advocates on both the sides and perusing the documents produced by the parties, the learned Trial Judge came to the conclusion that Plaintiffs have failed to make out any prima facie case for granting injunction and the balance of convenience is also not in their favour. Naturally, he dismissed the Notice of Motion.

The above order is challenged in this appeal. Shri Anil Singh, learned advocate for Plaintiffs has urged 3 points. Firstly, he submitted that the Plaintiffs are in occupation of the suit garages for several years and prove the same they have produced ration card, electoral roll etc. and it can not be said that Plaintiffs are encroachers. According to him, they are certainly "occupier" as contemplated by Section 354 and 499 of the said Act. Secondly, he canvassed before me that the reports submitted by the Court Commissioner is not correct. According to him, the other expert architect and consultants namely A. D. Shintre, consultants have also inspected the suit garages and submitted report dated 06/01/12006 wherein they have pointed out that whatever damage has been caused to the suit garages can be repaired by giving proper scientific treatment and the structure can be made stable and will be restored so as to make it suitable for occupation. He also submitted that merely because notice under section 354 of the said Act is issued it can not be said that suit structure must be demolished. If the same can be repaired then Commissioner has every power under Section 354 of the said Act to call upon the owners/occupiers to repair the same. He submitted that the occupiers are ready to carry out the repairs through approved structural engineer. According to him, Plaintiffs are in fact entitled for such recourse as per the provisions of Section 499 of the said Act. Lastly, he submitted that the suit notice is issued at the instance of landlords and defendant No. 7 with a view to gain more profit out of the suit land. He also submitted that if the structure is allowed to be demolished the Plaintiffs would be on street and

they would suffer irreparable loss. He, therefore, submitted that the appeal be allowed and the order passed by the learned Trial Judge be set aside and defendants be restrained from demolishing the suit structure till the disposal of the suit.

As against this, Smt. Jogalekar, learned Advocate for MCGB submitted that the notice issued by the defendant No. 1 is legal and valid. The Commissioner of MCGB has got every power to demolish the suit structure as the same is in dilapidated condition and dangerous. She, therefore, submitted that Plaintiffs are not entitled to get temporary injunction as prayed. Shri Vineet Naik, learned Advocate for the Respondent No. 7 strenuously argued before me that in the instant case independent, Government approved firm was appointed as Court Commissioner to submit report about the condition of the suit garages and the Court Commissioner has in unequivocal terms has reported that the suit garages are in dilapidated condition. They have become dangerous and likely to collapse. The same are beyond repairs. He also submitted that there is nothing on record to show that the action taken by the defendant No. 1 or the Commissioner of MCGB is mala fide or that it is at the instance of landlords or defendant No. 7. He, therefore, submitted that Plaintiffs have not at all made out any prima facie case to show that notice under section 354 of the said Act is bad in law. Lastly, he submitted that Plaintiffs are in fact encroachers. They have no legal right to occupy the suit garages. So, the balance of convenience is also not in their favour. He, therefore, submitted that the order passed by the learned Judge, City Civil Court, Bombay is legal and correct and there is no necessity to interfere with the said order in this appeal. He, therefore, submitted that the appeal be dismissed.

Shri M. M. Vashi, learned Advocate appearing on behalf of one of the garage occupiers of the garage submitted that she has in fact filed an application to intervene in the said suit in the City Civil Court, Mumbai. However, the Court has not passed any order on the said application. As the notice in question is not clear, the intervenor is in fact not in a position to note as to whether notice under section 354 is pertaining to her garage. But, with a view to put before the Court the real position and to protect her interest, she has filed the application for intervention. Learned Advocate for the intervenor submitted that the garage occupied by the intervenor is not at all in dangerous condition. There is no need to demolish the same. Though, the application for intervention has not been decided by the Trial Court, Shri Vinit Naik, learned Advocate for the defendant No. 7 fairly submitted that he has no objection to hear the intervenor in this appeal and as such, I have heard arguments of Shri M. M. Vashi, learned Advocate for the intervenor.

At the outset, it must be mentioned that it is not in dispute that the Plaintiff No. 1 is the Society registered under Society Registration Act and it does appear that defendant Nos. 2 to 6 are the members or office bearers of the said society. They are also occupants of the some of the garages involved in this suit.

It is true that in the plaint Plaintiffs have mentioned that they have filed the present suit in the representative capacity, however, there is nothing on record to show that they have taken leave under Order 1, Rule 8 of CPC. The learned Trial Judge has observed that he has not given importance to the said point as to whether the present suit is in representative capacity and has decided the Notice of Motion by considering the main issues involved in the matter.

It is not in dispute that on 12/11/2005, defendant No. 1 MCGB has issued notice under section 354 of the said Act. It would be worthwhile to see what said section says. It runs as follows :-

"354. Removal of structures, etc., which are in ruins or likely to fall - (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from, any building, wall or other structure) is in a ruinous conditions, or likely to fall, or in any way dangerous to any person occupying, resorting to or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure to pull down, secure or repair such structure, (subject to the provisions of section 342), and to prevent all cause of danger therefrom.

(2) The Commissioner may also if he thinks fit, require the said owner or occupier, by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence."

From bare reading of the above mentioned section and in particular the words "appeared to the Commissioner" it is very clear that before taking any action under section 354 of the said Act, there must be subjective satisfaction of the Commissioner regarding the fact that the structure in question has become ruinous or is likely to fall or it is dangerous to any person occupying the same or to the passers by. It is also clear from this provision that having once come to the conclusion that the structure in question is in ruinous condition or dangerous, then, the Commissioner has to select further course of action means, he has to decide whether the owner or occupier of the structure can be asked to pull down the said structure or to repair the same. This would obviously depend not on the vim of the commissioner but on the condition of the structure. While considering this, commissioner has to find out whether the structure is so dangerous or dilapidated that it is beyond repairs and as such it is necessary to pull down. So, he has to see factual position and find out whether the situation warrants pulling down of the structure or repairs of the structure. In the instant case, the Commissioner has

asked to pull down the garages.

The main and the material question is whether the action taken by the Commissioner directing the owners/occupiers to pull down the garages in the last two rows of the Dayramahal is legal and correct. It is needless to say that such action can be taken only if the concerned competent officer of defendant MCGB has inspected the structure in question and given opinion regarding its condition. In the instant case, during the course of arguments, learned advocate for the MCGB was called upon to produce the inspection report of the said officer on the basis of which action under section 354 of the said Act is taken in the instant case. Accordingly, the learned Advocate for the MCGB has produced the report of the concerned engineer of MCGB who carried out the inspection and also photographs taken by the said engineer. The said engineer has mentioned in his report :-

"the last row of garages on sea side are in dangerous condition and may collapse at any time.

There are 60 garages with broken/deteriorated RCC slab, corroded steel bars and cracked RCC beams. The RCC retaining wall on sea side may also collapse. The whole situation is dangerous and can take away lives of many persons."

In this report, there is also the note of the concerned officer wherein also it is stated that :-

"It is noticed that the last row of garages facing sea side are completely in dangerous condition. The core of RCC Slab is peeled out of steel bars are also exposed and corroded by atmosphere. The structure is in very much dangerous condition and may collapse at any moment."

So, from the above mentioned report, it is very clear that garages inspected by the said authorized engineer were found to be in dangerous condition. Though, it is tried to be argued on behalf of the MCGB that the corporation in its routine work checked the property and noticed the condition of the garages, if we peruse the reports of the concerned engineer of the Corporation mentioned above and in particular, the subject mentioned in the same it is quite evident that the corporation authorities visited the suit site in view of the complaint received about the condition of the property from Smt. Manju Bofana. Of course, merely because the Corporation visited the suit site after receiving complaint one can not jump to the conclusion that the Corporation has joined hands with the owners or that with defendant No. 7. Many a times it becomes really difficult for the Corporation to inspect each and every structure in the city and notice its condition. Some times, there is negligence on the part of the Corporation authorities in not carrying out their routine duties and as such some times the citizens are required to draw their specific attention to a particular thing. In such situation merely because the Corporation has initiated the action after the relevant position has been brought to their notice one can

not jump to the conclusion that the action that is being taken by the Corporation is mala fide. In the instant case, there is no prima facie cogent evidence to show that there is any collusion between the Corporation and the owners of the land below the garages or defendant No. 7.

The most important factor which is in favour of the defendant - corporation in the instant case is that the Court Commissioner who must be considered to be an independent competent authority authorized to submit report about the condition of the garages has reported that the garages in question are dangerous and in dilapidated condition. The commissioner has made following observations in his report.

(7) Description of suit property inspected :

Suit property located on C.S. No. 941 reclaimed land is two rows of garages consists of sixty garages each row having thirty garages measuring about 18.50 sq. meters with passage of about 5.25 M wide in between the rows. Constructed during 1971, garages to park the vehicles, roof top of the garages used as play ground. By physical inspection, we notice that there is no proper maintenance since then. The present condition is very bad and is collapsing and is unsafe for use and occupation. This structure has no proper retaining walls on all sides to resist the earth pressure on one side and varying pressure due to high tide and Low tide sea waves and water mass on three sides besides static self load of the structure. The existing structure is very weak and its structure stability is very very poor and its stability is not up to required standards. Any repairs in parts to the existing structure will not help in strengthening and improving the structural stability of the existing structure to the required standard, as stated else where the structure needs total R.C.C. reconstruction consisting of properly and suitably designed retaining walls slabs, beams and columns to take care of the anticipated loads both static and live loads that come on the structure. Even considerations of likely tsunami effects are also to be considered as it is facing sea.

8. Type of structure :

R.C.C. framed structure with R.C.C. roof slab (Very thin about 75 mm thick as against requirement of minimum 150 mm thick) on R.C.C. beams cross section depth varying from 450 mm to 660 mm width 150 mm to 225 mm on R.C.C. Columns varying cross section. 250 mm x 250 mm, 250 mm x 300 mm and 250 mm x 450 mm, 5.03 M Centre in one direction and 5.23 M in other direction, clear height about 3 M. Exposed external walls are about 100 mm thick. Constructed out of cement motor on 6 mm M.S. bar matting. Roofing to the garage also constructed from cement mortar on 6 mm M.S. bar matting. Inside partition walls are of brick in C.M. with C.M. Plastering, finished with white washing in parts 150 mm thick C.C. Flooring about 75 mm thick.

9. Loads acting on the Structure :

Besides static self weight, earth pressure on one side, static and oscillating/pulsating continuously varying live loads due to sea waves (high tide and low tide) and mass of sea water that lashes the structure on and off, wind loads and also live loads coming on play ground.

10. Present condition of the structure :

"Condition of the structure is totally damaged and in a dilapidated condition. Cement mortar portion has been peeled resulting in exposure of M.S. rods (steel) in the structure. M.S. rods have heavily rusted which affects the structure badly. There are no retaining walls three sides where the structure comes in contact with sea waves and water both high and low tide waves and one side abutting the ground. In fact the structure needs suitably designed load resistant retaining walls on all the sides, on one side to resist earth pressure on the other three sides to resist pressure due to high tide and low tide sea waves and saline water mass. The chipping of R.C.C. columns, beams and roofing have taken place very badly. The existing roofing is only 75 mm thick as against minimum requirement of 150 mm thick. Technically properly designed and constructed R.C.C. framed structure with R.C.C. slabs, beams supported on R.C.C. columns on column footings with suitable depth for foundation is a monolithic structure steel portion taking care of tensile loads and cement mortar portion taking care of compressive loads. In short, the present condition of the suit structure is very very bad needs total reconstruction using proper R.C.C. designs and construction techniques in practice as required immediately, otherwise, it will collapse resulting in major accident causing loss of many lives."

Thus, we find that the observations made by the Competent officer of the Corporation are corroborated by the independent unbiased authority i.e. Court Commissioner. It must be noted that Plaintiff had not taken any objection for the appointment of Business and Industrial Consultants as Court Commissioner. They have not at all attributed any mala fide or bias to the Court Commissioner. All that Plaintiff No. 2 has stated in his affidavit is that the report of the Court Commissioner is not correct. However, he has not demonstrated as to how the particular observations made by the Commissioner are incorrect. It is not even mentioned by the Plaintiffs that particular observations of the Commissioner ought to have been made after carrying out particular type of test or examination of the garages in question and the same has not been carried out and hence, Commissioner report in that behalf can not be accepted. In fact, even if we peruse the report of consultants of the Plaintiff i.e. A. D. Shintre, we find that they have also in fact stated that the condition of the garages in question is dilapidated. They have also shown various damages caused to the said structure and even according to them, it is necessary to have large scale basic repairs by following particular techniques. So, from the

bare reading of their report also it is clear that according to them it is necessary to carry out such type of repairs which in fact amount to total reconstruction of the structure. It obviously means that the present condition of the structure has become delicate. The structure has decayed and has become unstable, unsafe for use. While appreciating the Commissioner's Report in the instant case due weightage shall have to be given to the fact that it is the report given by an expert who is not interested either in Plaintiffs or defendants. His report has to be considered as unbiased. There is nothing on record to indicate that the conclusions drawn by the said expert are not correct. Even if, we see the photographs produced by the parties then also it is very clear that the roof of the garages is practically broken down. At many places it has in fact collapsed. Besides this, another very important factor in the instant case is that admittedly, garages in question are abutting Arabian sea. So, the structure which is of now about 35 years old is bound to get decayed. It is admittedly on a reclaimed land. The Commissioner has specifically mentioned that the RCC roof of the garages are not of the standard required. So, it must be said that initial opinion of the competent officer of the Corporation on whose opinion and recommendation the notice in question has been issued is correct. The only point is that the said report of the concerned officer was only pertaining to last row of the garages on sea side. Naturally, on the basis of the said report Commissioner should have issued notice under section 354 only in respect of the last row of the garages on sea side. However, we find that the Commissioner has actually issued the notice in respect of the last two rows of the garages. There is nothing on record to show as to on what basis the Commissioner included second row of the garages. So, in my view the decision of the MCGB in respect of the second row of the garages appears to be rather arbitrary. But, so far as last row of the garages on sea side is concerned, there is sufficient prima facie, evidence to show that garages in the last row have become dangerous, unstable, unsafe and as pointed by the Commissioner, there is no possibility of improving the said structure by carrying out repairs.

Incidentally, it must be noted that though now the Plaintiffs are saying that they are ready to carry out the repairs it must be noted that at no point of time prior to issuance of notice dated 12/11/2005, they had moved the Corporation or landlords for the repairs of the suit garages. It is only after the time they filed the present suit, they issued notice to the Corporation under section 499 of the said Act. The said notice in fact appears to have been given with a view to protract the matter and retain the possession by hook or crook.

It is needless to say that the primary object of the notice under section 354 of the said Act is the safety of the people who occupy the structure in question as well as the safety of the persons who are likely to pass by the side of the said structure. In the instant case, as mentioned above garages in question are in the basement and the roof of the said garages are at ground level and sea level. By passage of time, and as the same has not been properly maintained the structure has certainly become dangerous and it is not possible to improve the condition of the said structure. Merely by carrying out some repairs or

by some enforcements process, substantial portion of the garages in the last row on the sea side can not be restored to its normal condition. So, the discretion used by the Commissioner in directing the owners/occupiers to pull down the garages at least to the extent of the last row on the sea side is legal and correct and there is no need to interfere with the decision taken by the Commissioner in that behalf. However, as mentioned above there was no proper basis for the Commissioner to come to the conclusion that it is necessary to demolish garages in the second row, I think that the present notice issued by the Corporation in respect of the garages in the second row can not be held to be valid. It is needless to say that when the garages in the last row of the sea side have become dangerous and are likely to collapse, then if temporary injunction is granted then there is every possibility that if the said garages collapse it would cause great loss of lives which can not be compensated in terms of money and would cause irreparable loss. Hence, I pass the following order :-

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ORDER

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1. Appeal from order is partly allowed.

2. The order passed by the learned Judge, City Civil Court, Bombay rejecting Notice of Motion is confirmed only in respect of the garages in the last row on the sea side of the suit plot. However, Notice of Motion in respect of the garages in the second row from the sea side of the suit plot is allowed and defendants are restrained from demolishing garages in the second row on sea side of the suit plot till the disposal of the suit, without following due process of law.

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(S. R. SATHE, J.)

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At this stage, learned Advocate for the Appellant submitted that the above mentioned order be stayed for a period of 4 weeks. The learned Advocate for the Respondent strongly opposed the said application. The learned Advocate for the Appellant submits that since the time the present suit is filed in the year 2006 there was protection granted to the present Appellants and the same be continued for further period of four weeks. It is needless to say that while considering this prayer one has to take into

consideration the fact that this is not a case where the demolition is directed having resort to section 351 of the said Act but it is directed as per section 354 of the said Act.

However, considering all the facts and circumstances and with a view that aggrieved party should get an opportunity to redress their grievances before the superior court, the above mentioned order is stayed only till 20/09/2007.

