

(1971) 07 BOM CK 0002

In the Bombay High Court

Case No : Special Civil Application No. 259 of 1970 and Spl. C. As. No's. 744, 745 and 750 of 1970

Diwanchand Gupta

APPELLANT

Vs

N.M. Shah and Others

RESPONDENT

Date of Decision : 01-07-1971

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 354, 471, 507, 507(2), 56(3)
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28, 28(1)
Constitution of India, 1950 — Article 19, 19(1), 19(5), 19(6), 226

Citation : AIR 1972 Bom 316 : (1972) 74 BOMLR 259 : (1972) ILR (Bom) 1417 : (1972) MhLj 524

Hon'ble Judges : Vaidya, J;K.K. Desai, J

Bench : Division Bench

Judgement

Vaidya, J.—The above four petitions under Article 227 of the Constitution of India are directed against an order dated November 28, 1969 passed by the Chief Judge of the Court of Small Causes at Bombay in two applications filed u/s 507 of the Bombay Municipal Corporation Act, 1888. The said two applications were filed by respondent Nos. 2 to 8 in special civil application No. 259 of 1970, who own the premises bearing No. 61, Clive Road, Danabunder Bombay No. 9 consisting of a ground floor and two upper floors. Municipal Application No. 174/M of 1966 was filed against 17 tenants, one of whom is the petitioner in special civil application No. 259 of 1970. He was respondent No. 259 of 1970. He was respondent No 15 in the application. Municipal application No. 175/M of 1966 was filed against 16 respondents mentioned therein, of whom the petitioners in special civil application Nos. 744, 745 and 750 were some of the respondents. They were described as occupants, who were not the tenants of the owners.

2. In both the applications respondents Nos. 2 to 8 in special civil application No. 259 of 1970 (who will be hereinafter described as "the owners") stated that they were served with a notice bearing No. 18 dated June 11, 1965 from the Assistant Engineer, Division B, Bombay Municipal Corporation, which is as follows :-

"BOMBAY MUNICIPAL CORPORATION Notice u/s 354 of the Bombay Municipal Corporation Act, No. BN/18 of 1965 - 1966 Bombay, Dt. 11-6-1965. To Shri Parasram Dhanpat, The Owner of the Building Whereas it appears to me that the certain structure, to wit, a portion of the building on premises No. 61 situate at Clive Road, of which you are the owner is in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to, or passing - by the same. I hereby require you, u/s 354 of the Bombay Municipal Corporation Act to

To pull down the whole building upto ground level.

Time limit 30 days.

Note : The building is presumed to face Clive Road, on east and to prevent all cause of danger therefrom, I further hereby require you, under the aforesaid section of the Municipal Corporation Act, forthwith before proceeding to pull down, and secure the said structure to set up a proper and sufficient board or fence for the protection of passers - by and other persons. I give you notice that, if within 30 days from the service or receipt hereof this requisition be not complied with you render yourself liable to prosecution u/s 471 of the said Act and I may thereafter, pursuant to the provisions of Section 489 of the said Act take such measures or cause such work to be executed or such thing to be done as shall in my opinion be necessary for giving due effect to this requisition and you will be liable for the expenses thereof which will be recovered from you in the manner provided by Section 491 of the said Act. No portion of the structure within the regular line of the street may be reconstructed nor may anything within the scope of Section 342 of the said Municipal Corporation Act, other than the work which you are expressly required by this notice to do, be made or done without previously giving notice thereof as required by Section 342 aforesaid.

Sd/- (Illegible) Sd/ Coutinho S. E. B. South Assistant Engineer Division B Bombay Municipal Corporation. Note : Under S. 68 of the Bombay Municipal Corporation Act the Municipal Commissioner for Greater Bombay has empowered the Asstt. Engineer Division B to exercise perform and discharge all the powers duties and functions conferred and imposed upon and vested in the Commissioner by Sections 354 and 489 of the said Act".

It was alleged by the owners that although the owners were called upon by the said notice to pull down the said building upto the ground level as the building stood in a ruinous condition, the petitioners in these special civil applications and the other tenants and occupants (who will all be hereinafter described as "occupiers") failed to vacate the premises and made it impossible for the owners to comply with the notice, which was given u/s 354 of the Bombay Municipal Corporation Act and rendered respondent No. 2 in special civil application No. 259 of 1970, Parasram Dhanpat, liable for prosecution by the Bombay Municipal Corporation. It was alleged that a case bearing No. 563 of 1965 was filed against respondent No. 2, one of the owners, in the Court of the Presidency Magistrate, 28th Court, Esplanade, Bombay and he was convicted and sentenced to pay a

fine of Rs. 50/- in the said case on February 22, 1966. The owners further alleged that thereafter a portion of the wall supporting the staircase leading to the second floor of the building in the premises referred to above collapsed, resulting in further deterioration of the structural condition of the building. The Municipal authorities then warned some of the occupants by a notice through their Advocate dated June 6, 1966 to vacate the premises occupied by them forthwith. In spite of this, the occupants failed and neglected to vacate the premises and refused to afford necessary facilities to the owners to pull down the building as required by the aforesaid notice dated June 11, 1965. It is in these circumstances that the two applications mentioned above were filed by the owners on July 13, 1966 u/s 507 of the Bombay Municipal Corporation Act.

3. The petitioners in these special civil applications resisted the owners' applications by filing affidavits in reply to the applications contending inter alia that the applications were not properly filed, that they were belated and mala fide, that the owners had got the notice issued in collusion with Municipal officials with a view to get rid of the petitioners and other occupiers and thereafter to sell the plot as an open plot fetching a fabulous price or to reconstruct on it and let the same out to others free of any claim of the tenants, that the aforesaid notice purported to have been issued by the Assistant Engineer was invalid inasmuch as the signatory to the notice had no legal and valid authority to issue it and the notice was arbitrary, capricious and mala fide and that it was not expedient to pull down the tenements let out to the petitioners.

4. The learned Chief Judge allowed the parties to lead evidence and after considering the oral and documentary evidence before him and the contentions raised by the occupants passed the impugned order referred to above granting the applications of the owners. In Municipal Application No. 174 of 1956, all the respondents including Diwanchand Gupta, the petitioner in special civil application No. 259 of 1970 were directed to remove themselves from the premises in their occupation by January 31, 1970 in order to afford facilities to respondent No. 2 to enable him to comply with the requisition in the aforesaid notice and the tenants were directed to pay to respondent NO. 2 court costs. The application was dismissed so far as respondents Nos. 3 to 8 were concerned as they were minors and it was respondent No. 2 alone who fell within the definition of the word "owner" in Section 3, clause (m) of the Bombay Municipal Corporation Act. In Municipal Application No. 175 of 1966, also, the occupants were directed to remove themselves from the premises in their occupation before January 31, 1970 in order to afford facilities to respondent No. 2 to enable him to comply with the notice. That application was also dismissed so far as respondents Nos. 3 to 8 were concerned.

5. Feeling aggrieved by the said decision of the Chief Judge, the tenant Diwanchand Gupta has filed special civil application No. 259 of 1970. Special Civil Applications Nos. 744, 745 and 750 of 1970 are filed by some of the occupants aggrieved by the said order, praying for quashing the notice dated June 11, 1965

and the aforesaid order passed by the Chief Judge of the Small Causes Court.

6. In support of the petition, the first contention raised by Mr. Chagla, the learned Counsel for the petitioner in special civil application No. 259 of 1970, was that the notice having been issued as far back as June 11, 1965 had lost its effect or efficacy firstly because of the lapse of time from the date of its receipt till now, secondly because although the owners could have filed a suit to recover possession of the premises under S. 13(1)(hhh) of the Bombay Rents, Hotel and Lodging House Rates Control Act, they had failed and neglected to do so; thirdly because although part of the premises were pulled down, the petitioners were occupying the remaining premises which at present admittedly consist of two rooms on the first floor and the entire ground floor without anything untoward happening to any of them or to any member of the public since 1965, and fourthly that after pulling down the rest of the premises, certain repairs of the building have been carried out and the building had ceased to be dangerous or liable to be pulled down under the notice. Mr. Shah, the learned Counsel for the remaining petitioners, further urged that the efficacy of the notice ought to have been judged by the learned Chief Judge with reference to the time of the making of the application or the time of the making of the order by him; and as he had not done so, the order of the learned Chief Judge was liable to be set aside.

7. We do not find any substance in any of these contentions in view of the scheme of the provisions contained in Sections 354 and 507. The scheme of these provisions was considered by a Division Bench of this Court in Nathubhai Dhulaji and Others Vs. The Municipal Corporation, Bombay and Others, . The said case arose out of suits filed in the City Civil Court by tenants of a building in respect of which a pulling down notice u/s 354 was issued to the landlord, who was sued by the tenant as defendant NO. 1 in those suits. One of the contentions raised before this Court in that case was that the notice issued to defendant No. 1 u/s 354 was mala fide both in fact and in law. The Division Bench consisting of Dixit and Tarkunde, JJ. observed at page 520 after quoting the provisions of Section 354 as follows :-

"The title under which this section occurs is "Dangerous Structures", and one has only to read the section to realize that the intention of the section is to secure public safety. The authority issuing notice u/s 354 has to objectively consider certain facts. After having ascertained the facts objectively, he has to satisfy himself as to whether or not he would issue a notice u/s 354. First, he has to consider whether a building is in a ruinous condition or is likely to fall or is in any way dangerous to any person occupying, resorting to or passing by such structure. This embraces not merely the persons who occupy the building but also those who go to the building and also those who happen to pass by the building. Therefore, the authority issuing notice u/s 354 has to ascertain these facts objectively. He has then to consider another fact objectively, which is, having regard to the state of the property, what is the degree of risk to the public safety, and having ascertained this, he has then to consider whether he would

issue a notice to the owner or occupier requiring him either to pull down the building or to repair it. It is quite clear, therefore, that the authority issuing notice u/s 354 has to ascertain certain facts objectively and then to satisfy himself. In other words, the satisfaction is his own satisfaction, i.e., the subjective satisfaction of the authority issuing notice u/s 354."

Having regard to the facts of that case, they hold that all that the authority had to do was to act bona fide and not to act capriciously or with an improper motive. But if he considers the facts objectively and comes to a particular conclusion, his satisfaction would not then be open to challenge, provided he has come to the conclusion honestly and bona fide. They also observed :

" A building which needed repairing in 1954 may in conceivable circumstances, require pulling down in 1956. But whether the building should be pulled down or repaired is a matter of which the authority is the sole judge, and so long as the authority keeps himself within the limits of the authority given to him by Section 354, his discretion is absolute".

With respect , we are bound by this view enunciated about the scope and effect of Section 354.

8. It was not even argued before us that impugned notice was issued mala fide by the Assistant Engineer. The fact that the building was subjected to some repairs, which were not repairs to the entire building but repairs effected to undo the damage caused while pulling down the rest of the building, or the fact that notwithstanding the lapse of time till now, the building has survived several seasons without any untoward incident happening to the inmates or to the passers - by, cannot be sufficient to interfere with the subjective satisfaction of the Assistant Engineer, who has stated in the notice that a portion of the building on premises No. 61 was in a ruinous condition, likely to fall and dangerous to persons occupying resorting to or passing by the same. The satisfaction on these facts is the satisfaction of the authorized officer u/s 354. It is not open to the Court or any other authority, unless empowered by law, to sit in judgment over that satisfaction.

9. Moreover, the above arguments urged by Mr. Chagla and Mr. Shah in support of their contention that the notice has ceased to be efficacious are all without any substance. This is particularly so because once a notice is issued u/s 354 to the owner, the owner is liable to be prosecuted for non - compliance with the notice u/s 471 (b), unless he obtains an order S. 507 directing the occupiers of the building to afford all reasonable facilities to the owner for complying with the notice. Section 507 (3) further lays down :-

"After eight days from the date of any such order, it shall be incumbent on the said occupier to afford all such reasonable facilities to the owner for the purpose aforesaid as shall be prescribed in the said order; and in the event of his continued refusal so to do, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his

failure to comply with the said provision or requisition."

Furthermore, u/s 471 (b) the occupants, who refuse to vacate the premises or afford reasonable facility to the owner are themselves liable to be punished for each such offence of non - compliance with the requisition. In our opinion, therefore, it is idle to contend that the notice issued by the Assistant Engineer u/s 354 has become inefficacious or the order passed by the Chief Judge with reference to that notice has no relevance to the present conditions affecting the legal rights and obligations of the owners and occupiers of the building in respect of which the notice is given.

10. The second and the most important contention raised by Mr. Chagla was that the notice u/s 354 calling upon their owners to pull down the building not only threatened the rights of the petitioners to occupy the building but affected his client's right to carry on business of a hotel in the said building; and before so prejudicing the rights or threatening the rights of his client, the authority issuing notice under S. 354 was bound to give notice to his client. In other words, notwithstanding the absence of any express provision requiring a show cause notice to be issued u/s 354, it was incumbent on the authority consistent with principles of natural justice and fairplay, to give a notice of the proposed order of pulling down u/s 354. It must be noted that although this plea of violation of principles of natural justice was taken in some of the affidavits in reply filed by some of the occupants, the point does not appear to have been pressed at the hearing of the applications before the learned Chief Judge. Mr. Chagla contended that notwithstanding this, it is open to this Court in exercise of its powers under Art. 227 of the Constitution to decide whether the authority issuing notice u/s 354 should issue a show cause notice and give an opportunity of hearing to the occupants of a building in respect of which the notice is issued. He submitted that although a Division Bench of this Court in the aforesaid case of *Nathubhai Dhulaji and Others Vs. The Municipal Corporation, Bombay and Others*, had negatived this contention, that view was based on the earlier decisions of the Supreme Court following the decision in *Province of Bombay Vs. Kusaldas S. Advani and Others*, . But that view was displaced by subsequent decisions of the Supreme Court, which, according to Mr. Chagla, laid down that irrespective of whether the decision was an administrative or quasi - judicial one, the concept of rule of law will lose its vitality if the instrumentalities of the State were not charged with the duty of discharging their functions in a fair and just manner. In other words, Mr. Chagla submitted that we should not follow the decision of this Court in *Nathubhai's* case in view of the later decisions of the Supreme Court which have applied principles of natural justice to even administrative decisions.

11. Even assuming that this point could be urged for the first time in this petition under Art. 227 of the Constitution by the petitioners, though it is not dealt with by the learned chief Judge in the impugned order, we do not find any substance in the contentions raised by Mr. Chagla on the basis of the principles of natural justice in the context of Section 354. Section 354, no doubt, empowers the

Commissioners to issue a notice under that section either to the owner or to the occupier. In the present case, notice has been issued only to the owners. The owners do not have any grievances of violation of principles of natural justice. The section does not require a notice to be given to the occupiers in all cases where owners are given notice. Mr. Chagla had to concede that there is nothing expressed in the section itself which requires a notice to be given to the occupants of a building when the notice is given to the owner thereof. But what he contends is that as the notice is a threat to the right of the occupants to continue to occupy the building and to carry on business in the building, it would be unreasonable to prejudice their rights without giving notice to them. For this purpose, he relied on the provisions contained in Article 19(f) and (g) and submitted that the occupants' right to hold the property and carry on the business in the property would be jeopardized if a notice is given to the owner without any opportunity being given to the occupants. He rightly conceded that he could not rely on Article 31(1) as Article 31(1) lays down no such protection and it merely says that no person shall be deprived of his property save by authority of law.

12. This very argument was however negated by this Court in *Nathubhai Dhulaji and Others Vs. The Municipal Corporation, Bombay and Others*, with the following observations at page 520 :-

"The contention which has been taken by Mr. Phadke is that Section 354 does not make provision for the right of a person to be heard. The short answer to this contention is that Section 354 does not provide for a hearing to be given to persons such as the plaintiffs in this case. When the contention is that the authority must act judicially, what the Court is concerned with is to see whether the section under which the right is claimed requires a hearing to be given. If the section of a statute requires that a hearing should be given, then surely the approach of the authority must be a judicial approach. But the alternative argument which has been advanced by Mr. Phadke is that even if the authority may not be bound to act judicially, the principles of natural justice require that a party should be heard before his rights are affected in any way. So far as the judicial approach is concerned, there is no difficulty in holding that the notice issued u/s 354 is an executive act or an executive order, and when by statute a provision is not made for hearing, it is impossible to accept the contention that the authority is bound to act judicially; nor is, in my opinion, the contention tenable that although the section does not provide for a hearing, the rules of natural justice require that a party should be heard before his rights are affected".

13. Now, it is true that in arriving at the above conclusion, this Court relied on the principles laid down by the Supreme Court in *Province of Bombay Vs. Kusaldas S. Advani and Others*, . It is also true that in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, the view taken is that the dividing line between an administrative power and a quasi - judicial power is quite thin and is

being gradually obliterated; and that what was considered as an administrative power some years back is now being considered as a quasi judicial power; and further that with the increase of the power of the administration bodies, it has become necessary to provide guidelines for the just exercise of their power. The Supreme Court, therefore, remarked that to prevent the abuse of that power and to see that it does not become a new despotism courts are gradually evolving the principles to be observed while exercising such powers. But at the same time, the Supreme Court observed that the scope of the application of principles of natural justice to the exercise of executive power was qualified with reference to the statute under which the said powers were exercised. In *Union of India (UOI) Vs. Col. J.N. Sinha and Another, Hegde, J* speaking for the Court reviewed the earlier case law and laid down

"Rules of natural justice are not embodies rules nor they can be elevated to the position of fundamental rights. As observed by this Court in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it". It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power".

14. Applying, therefore, these principles to the facts of the present case, we find that the power conferred u/s 354 is a power in the public interest. The section gives power to the Commissioner. If it shall at any time appear to him that any structure (including any building, wall or other structure) is in a ruinous condition, 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 neighborhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure to pull down, secure or repair such structure, and to prevent all cause of danger therefrom. Such a power must be considered as a reasonable restriction on the right of the property as well as the right to carry on trade or business within the meaning of Art. 19(1)(f) and (g) read with Art. 19(5) and (6) of the Constitution which empowers the State to make any law imposing, in the interests of the general public, reasonable restrictions.

15. In the facts of the present case, we find that the authority issuing the notice has not only satisfied himself about the ruinous condition of the building, but a portion of the building collapsed and a major portion of the building has been pulled down in pursuance of the notice; and although the owners had made applications against all, the tenants and occupants, as stated above, the grievance is made against the order only by six of them. Having regard to these facts and circumstances, we are, therefore, of the opinion that the question of violation of principles of natural justice before issuing a notice u/s 354 is entirely irrelevant. The section did not require a notice to be given. The facts and circumstances clearly show that it was unreasonable to expect a notice to be given to the occupants of this dilapidated building with a view to comply with principles of natural justice. The contention of the Counsel for the petitioners that the notice violated the principles of natural justice must, therefore, fail

16. It was next contended that the authority, who issued the notice, was delegated the power to issue the notice u/s 354 by the Deputy Commissioner who was himself a deputy of the Municipal Commissioner and this violated the principle contained in the maxim delegates non protest delegare. The law on this point is succinctly stated in Allen on Law and Orders, 2nd edition at page 204 as follows :-

"With regard to executive functions, it is clear, on the one hand, that any administrator, whether of Ministerial degree or below it, must be allowed a reasonable amount of delegation in ordinary routine duties; but, on the other hand, if certain specific executive functions are committed to him, he cannot, without authority, entrust them to a deputy of his own choice."

Wade on Administrative Law, 2nd edition, 1967, at page 59 has stated the law as follows :-

"Although, therefore, the Courts are strict in requiring that statutory power shall be exercised by the persons on whom it is conferred, and by no one else, they make liberal allowance for the working of the official hierarchy, at least so far as it operates within the sphere of responsibility of ministers of the Crown. Powers, conferred upon special statutory bodies are more jealously watched, as we have noticed. Yet the maxim delegatus non potest delegare, like so many of the other rules of administrative law, turns out to be more than a qualified rule for the interpretation of Parliament's intentions".

17. It is, therefore, necessary for us to consider whether in enacting the relevant provisions of Bombay Municipal Corporation Act, the legislature had intended that the Deputy Commissioner, to whom powers of the Commissioner were delegated, had no power to delegate the powers to the Assistant Engineer, who, in the present case, issued the notice.

18. The learned Chief Judge considered the proceedings of the Municipal Corporation of Greater Bombay at Ex. L relating to the Corporation resolution No. 820 dated October 28, 1958 and the Corporation resolution No. 331 dated May

16, 1960, which refers to the information given by the Commissioner u/s 56 (2) (b) and proviso to S. 56 - B (1) of the Bombay Municipal Corporation Act, stating that the Commissioner had deputed inter alia to the Deputy Municipal Commissioner Mr. S. M. Y. Shastri the powers u/s 354. He also considered Ex. H, which record the deputation of the powers to the Deputy Commissioner as well as Ex. G under which powers were delegated on September 26, 1960 to the Assistant Engineer Mr. Countinho (who issued the impugned notice) including the powers to issue notice u/s 354, and held that in view of the provisions of S. 56 (3) of the Bombay Municipal Corporation Act, the Deputy Commissioner Mr. Shastri could validly delegate his powers u/s 68 to Mr. Countinho, the Assistant Engineer. In effect, he held that as u/s 56 (3) all acts and things performed and done by a Deputy Commissioner during the tenure of his office and in virtue thereof shall do all purposes be deemed to have been performed and done by the Commr., the Deputy Commissioner Mr. Shastri had a statutory authority or permission to delegate the powers of the Commissioner u/s 354 to Mr. Countinho, the Assistant Engineer. We find no reason to disagree with the view taken by the learned Chief Judge.

19. Mr. Chagla, however, contended relying on a decision of the Supreme Court in Mangulal Chunilal Vs. Manilal Maganlal and Another, that in view of the principles laid down in that case, the second delegation of powers by the Deputy Commissioner to the Assistant Engineer in the present case was invalid. This very case was cited before the learned Chief Judge and the learned Chief Judge rightly distinguished the case as one to be read in the context of the provisions of the Bombay Provincial Municipal Corporation Act, 1949 and the facts of that case; because the facts in that case were that the complaint had been filed by the Licence Inspector whereas the delegation u/s 59 in that Act was to the Deputy Health Officer to take proceedings as provided in Section 481 of that Act. There was no delegation of any power under any section of the Act by the Deputy Health Officer to the Licence Inspector. It is in view of those facts that the Supreme Court, with respect, rightly held that the Licence Inspector had no valid authority to file the complaint. In the present case, however, under Ex. G the power was validly delegated to the Assistant Engineer to issue the notice; and, as stated above, the maxim delegates non potest delegare cannot be invoked where the statute has permitted the delegation. The contention of the petitioners that the notice was not validly issued by the Assistant Engineer must be, therefore, rejected.

20. IN view of this, Mr. Chagla could not press his contention that merely because the notice mentioned in a foot note that the Assistant Engineer was delegated the power by the Municipal Commissioner contrary to the real facts, which showed that it was the Deputy Commissioner who had delegated the powers to the Assistant Engineer, the notice was invalid. It must be noted that it has been repeatedly pointed out by this Court that the Municipal Corporation should state the correct facts in the foot not and not mislead the recipient of the notice about the delegation. But the mere mis - statement by the Municipal

Corporation, which unfortunately is persisted in spite of observations made from time to time by this Court, is not sufficient to invalidate the notice because u/s 56 (3) the Deputy Commissioner is deemed to be a Commissioner for all purposes of the Act, as stated therein.

21. It was next contended that Section 354 conferred an unfettered discretion on the authorities which empowered them to pick and choose and indulge in unfair discrimination against the citizens and issue notice to whomsoever they like. This argument must be rejected not only because it is an erroneous contention in view of the provisions contained in the section but also because the principles on which the discretion has to be exercised have been laid by this Court in Lalbhai Tricamlal Vs. The Municipal Commissioner for the City of Bombay, . In that case it is laid down that the word "appear" in the section does not involve "appears to the eye", but it was sufficient if it appeared to the Commissioner on the representations of a competent officer whose duty it was to make such representations, and it was also laid down :-

"But the Commissioner's action when "it appears" is judicial, so that he must exercise his discretion in determining what action should be taken. He does not satisfy this test, where he merely signs the notice which is sent to him by the Executive Engineer because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section which should be considered as a notice to show cause

Discretion must not be arbitrary

The legislature has vested in the Commissioner a discretion in the matter (Section 354), and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith. But the Court is, in the first instance, entitled to inquire whether the discretion has been exercised. The discretion has to be exercised first in coming to a conclusion as to the state of the structure and then in fixing upon the remedy.

It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore, it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken".

With respect, we agree with these principles and it is unnecessary for purposes of this case to state anything more with regard to the scope and effect of the discretion conferred on the Commissioner or anyone acting in exercise of the powers of the Commissioner delegated to him u/s 354. There are no allegations in this case of any capricious exercise of power by the Assistant Engineer or any

unfair discrimination against the landlord. In fact, as stated above, the owners have not only challenged the notice but have already partially complied with the notice. In these circumstances, it cannot be said that the discretion exercised by the Assistant Engineer was exercised unfairly or capriciously or mala fide.

22. It is, however, contended on behalf of the occupants that the landlord himself had colluded with the Assistant Engineer. But apart from the allegation, there is nothing on the record to show that the Assistant Engineer had colluded with the landlord. It is true that the learned Chief Judge did not allow the petitioners to lead any evidence on the point. Six of the owners are minors and we find no reason whatsoever for the Assistant Engineer to collude with respondent No. 2. No allegations were made against the Assistant Engineer himself, apart from the vague allegation that he colluded with the owners. It is not sufficient to hold that the Assistant Engineer had acted mala fide in issuing the notice.

23. Moreover, it is not for the Court to satisfy itself whether the building was in a dangerous condition when the notice was issued. The fact that part of the building has been already pulled down and the majority of the occupants have no grievance against the pulling down itself further shows that the allegations of mala fides made against the Assistant Engineer is baseless. The criterion of the building being in a ruinous condition or dangerous to the occupants and to the passers - by, as required by Section 354, has been applied by the Assistant Engineer in the notice which mentions that the building "is in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to, or passing by the same". As Lord Halsbury stated in *Westminster Corporation v. London and North Western Railway* 1905 AC 426.

"Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion".

In the absence of anything to show abuse of the discretion or mala fide or capricious exercise of the discretion, it must, therefore, be held that the contention of the petitioners that there was an unfair discrimination against them as citizens in violation of their right under Art. 14 of the Constitution of India is without any foundation.

24. The next contention urged on behalf of the petitioners is that the learned Chief Judge had no jurisdiction to entertain the applications u/s 507 as the owners had a special remedy under the special statute, viz., the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 for recovering possession of the premises in the possession of the tenants if the Court under that Act is satisfied u/s 13 (1) (hhh) that the premises are required for the immediate purpose of demolition ordered by any local authority or other competent authority. Apart from authority, in our opinion, the contention must be rejected, because it is only in respect of suits or proceedings between landlords and tenants relating to recovery of rent or possession of any premises to which

Bombay Rent Act applied and in respect of applications made under that Act or any claim or question arising out of the Act or any of its provisions that the jurisdiction of other Courts is excluded u/s 28 of the Bombay Rent Act. The application made by the owners u/s 507 of the Bombay Municipal Corporation Act does not fall under any of the categories of suits or proceedings referred to in Section 28(1) of the Bombay Rent Act. It cannot be said that an application u/s 507 relates to the recovery of possession of the premises because Section 507 empowers the Chief Judge to make a written order "requiring the occupier of the building or land to afford all reasonable facilities to the owner for complying with the notice". Section 507 is not concerned with the termination of the tenancy or recovery of the possession of the premises but only with providing reasonable facilities to the owner to comply with a notice issued to him under the provisions of the Bombay Municipal Corporation Act. Such a question cannot be said to be a claim or question arising out of the Bombay Rent Act or any of its provisions. The tenancy is not terminated before or by making an application u/s 507. Section 507 enables the owner to get an order from the Chief Judge directing the occupants to give reasonable facilities and merely states that if the occupants fail to afford the facilities after 8 days from the date of the order, the owner shall be discharged, during the continuance of such refusal, from any liability which he would otherwise incur by reason of his failure to comply with the said provision or requisition. It is true that the consequence of the refusal is that the occupants made themselves liable to be prosecuted u/s 471, as stated above. But this is not a question or claim arising out of any provisions of the Bombay Rent Act and we find nothing conflicting between S. 13(1)(hhh) and Section 28 of the Bombay Rent Act and Section 507 of the Bombay Municipal Corporation Act from which we could infer an implied repeal of Section 354 of the Bombay Municipal Corporation Act. On the contrary, having regard to the nature and purpose of these provisions, it is clear that these sections can exist together and the applications made by the owners u/s 507 were maintainable notwithstanding Section 28 of the Bombay Rent Act. In *Mohmed Haji Noormohamed Vs. Mona Vicaji Javeri, Miabhoy, J.* as he then was, was concerned with a contention which was the reverse of the contention raised before us. In that case, a suit filed u/s 13(1)(hhh) in the Small Causes Court was contested on the ground that it was not maintainable in view of the provisions of Section 507 and, with respect, he rightly held that when the owner of the building had availed himself of the remedy given in Section 507 of the Bombay Municipal Corporation Act, he was not disentitled to the further remedy provided to him u/s 13(1)(hhh) of the Bombay Rent Act, 1947.

25. However, Mr Shah submitted that this view will be contrary to the view taken by the Supreme Court in *Sushila Kashinath Dhonde and Others Vs. Harilal Govindji Bhogani and Others*, . This submission, in our opinion, must be rejected because all that is laid down by the Supreme Court in that case, with respect, was that if a suit involved reliefs to be granted to the plaintiff based on claims or questions arising out of the Bombay Rent Act, the suit could be dealt with only by

the Special Court constituted under S. 28 of the Act. In that case under a written agreement, the plaintiff gave a loan to the defendants for the purpose of financing the erection of a building on land held by the defendants as owners. The agreement was registered and it included the various conditions referred to in S. 18 (3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In a suit by the plaintiff filed against the defendants in the Court of Small Causes, Bombay the reliefs asked were a declaration that the sum advanced as loan be a charge on the building and land on which it was constructed and that the plaintiff was entitled to recover the amounts mentioned in the agreement. In view of these facts, with respect, the Supreme Court rightly held that the reliefs claimed were all claims or questions arising out of the Act.

26. As stated above, the reliefs u/s 507 of the Bombay Municipal Corporation Act have nothing in common or similar to the claims or questions which arise under the Bombay Rent Act and hence, the said decision relied on by Mr. Shah has no application to the facts of the present case. It must, therefore, be held that there is nothing in Section 13(1)(hhh) or S. 28 of the Bombay Rent Act which takes away the jurisdiction of the Chief Judge u/s 507 of the Bombay Municipal Corporation Act.

27. Mr. Shah who appeared for some of the petitioners, urged two further points in support of the petition. The first of them was that u/s 507 the learned Chief Judge could not have ordered the occupants to vacate the premises. In support of his argument Mr. Shah relied on the decision in Ahmedalli Abdulhusein Kaka and Another Vs. M.D. Lalkaka and Others, which lays down the principles which should followed by the Chief Judge when dealing with the cases u/s 507 and gives him a discretion to decide whether th occupants should be asked to vacate the entire building or a portion of the building. But, in our opinion, there is no substance in this contention of Mr. Shah because all that the learned Chief Judge has ordered in the present case is that the occupants should remove themselves "in other to afford facilities to respondent No. 1 to enable him to comply with the notice." The said order is consistent with the provisions of Section 507 (2) which empowers the Chief Judge to require the occupiers "to afford all reasonable facilities to the owner". The powers here are wide enough to include a power to order the occupant to vacate the premises if that is necessary for giving a reasonable facility to the owner.

28. The second contention urged by Mr. Shah is that the learned Chief Judge failed to exercise his mind on the question as to whether the building was really in a ruinous condition, as alleged in the notice. As stated above, the question rested on the subjective satisfaction of the authority exercising the power u/s 354 and the learned chief Judge was, therefore, right in not going into that question. Moreover, it is difficult to see how a Court of law can decide such a question. The municipal authorities are satisfied that the building is in a ruinous condition. The statute does not provide for a right of appeal to the Court against the said satisfaction. The Court of law cannot, therefore, sit in judgment over the

decision of the municipal authorities.

29. For these reasons, all the contentions raised by the petitioners fail. The rule in all the petitions discharged with costs. Costs of the Municipal Corporation fixed at Rs. 400/- in one petition. Costs of the respondents quantified at Rs. 300/- in each of the petitions.

30. Rule discharged.