(2023) 03 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 2544 Of 2021

Western Refrigeration Engineering And Others — APPELLANT

Vs

State Of Maharashtra And Others — RESPONDENT

Date of Decision : 17-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Municipal Corporations Act, 1949 — Section 260, 261, 264, 264, 264(1), 264(2), 267, 300, 303, 354(1), 433A, 478

Citation : (2023) 03 BOM CK 0049

Hon'ble Judges : A.S.Chandurkar, J;Vrushali V. Joshi, J

Bench : Division Bench

Advocate : Sudheer S. Voditel, R.S. Renu, J.B. Kasat, N.D. Khamborkar, S.M. Ghodeswar

Final Decision : Dismissed

Judgement

A.S. Chandurkar, J

1. RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The challenge raised in this writ petition filed under Article 226 of the Constitution of India is to the notice dated 05.03.2021 issued by the Nagpur Municipal Corporation under the provisions of Section 264(1) of the Maharashtra Municipal Corporations Act, 1949 (for short, ‘the Act of 1949’). A further challenge has been raised to the constitutionality of Section 433A of the Act of 1949 since it bars the questioning of a notice issued under Section 264 of the Act of 1949 in any suit or legal proceedings.

3. The facts giving rise to the present proceedings are that the respondent nos.3A, 3B and 4 claim ownership rights in the premises standing on Plot No. 29, Municipal House No. 36, Great Nag Road, Nagpur which is in occupation of the petitioners as tenants. For the reason that the structure in question was quite

dilapidated requiring the same to be pulled down, the owners on 01.11.2020 made a complaint to the Municipal Authorities requesting it to pull down the same in accordance with law. On receiving the aforesaid complaint, the Municipal Corporation on 22.01.2021 called upon the owners to submit a Structural Audit Report from a recognized Auditor from the panel of Structural Auditors maintained by the Municipal Corporation to enable it to consider the complaint of the owners. The owners on 10.02.2021 obtained a Structural Audit Report of the premises in question from 4th D Design Structural Designer, a Structural Consultant. Under the said report, it was recommended that the structure ought to be demolished at the earliest in the interest of property and human life. The owners on 16.02.2021 forwarded this report to the concerned department of the Municipal Corporation. The Municipal Authorities after considering the said report and after inspecting the premises issued the notice dated 05.03.2021 under Section 264(1) of the Act of 1949 to the owners as well as the petitioners-occupants stating therein that within a period of seven days of receiving the said notice, the structure should be pulled down. Since no further action was taken in the matter, the Municipal Corporation on 30.06.2021 made a request for grant of police protection to undertake demolition of the structure. A similar request was also made by the owners on 16.09.2021. On 27.10.2021 the Municipal Authorities issued another communication to the owners as well as the occupiers stating therein that when the site was inspected on 26.10.2021 it was noticed that half of the said structure had been pulled down while the remaining half structure which was in a dilapidated condition was found standing. The remaining structure was also directed to be pulled down. Some of the petitioners on 21.12.2021 issued a communication to the Mayor of the Municipal Corporation stating therein that another Structural Audit Report dated 08.03.2021 submitted by M.R. Shelote and Associates had been obtained by them which did not require the entire structure to be pulled down. A request was made to take necessary action in that regard and prevent the pulling down of the said structure. The Mayor accordingly called for necessary reports in that regard from the concerned department. On there being two contradictory reports with it, the Municipal Authorities called for another Structural Audit Report from the Visvesvaraya National Institute of Technology, Nagpur (for short, 'VNIT') being an independent authority. After the expenses towards such report were paid by the owners, the VNIT submitted its report dated 28.07.2022. As per the said report, it was opined that the premises were in a dilapidated condition having been constructed about sixty five years ago and hence, it was recommended that the same be demolished at the earliest. It is in this backdrop that the challenge to the notice dated 05.03.2021 has been considered.

4. Shri Sudheer Voditel, learned counsel for the petitioners referred to various provisions of the Act of 1949 and especially the provisions of Chapter-XV with regard to the dangerous structures. It was submitted only if a structure was in a ruinous condition or was likely to fall that the Designated Officer could by issuing a written notice require the owner or the occupier of such structure either to pull

down the same or repair that structure so as to prevent all causes of danger therefrom. Referring to the provisions of Section 300 of the Act of 1949 in the matter of demolition of insanitary building, Section 303 with regard to demolition of obstructive buildings and Section 306 which provided the remedy of appeal against any demolition order made under Section 300 or Section 303 of the Act of 1949, it was submitted that such remedy against a notice issued under Sections 260, 261, 264, 267 or 478 of the Act of 1949 was not provided. A notice issued under the aforesaid provisions could not be questioned in any suit or other legal proceedings. While absolute discretion was vested with the Designated Officer, a party aggrieved by the issuance of such notice was precluded from challenging the same before the Civil Court. It was thus submitted that an aggrieved party was not provided any statutory remedy to question the issuance of such notice nor was any civil suit maintainable to challenge the same. Section 433A of the Act of 1949 was thus unconstitutional since there was a bar in challenging or questioning a notice issued under Sections 260, 261, 264, 267 or 478 of the Act of 1949 in any legal proceedings.

Without prejudice to the aforesaid, it was submitted that the report obtained by the petitioners was from a Structural Auditor whose name was included in the panel of Architects authorized by the Municipal Corporation and that report clearly stated that it was not necessary to demolish the entire structure. Without considering the effect of that report the Municipal Authorities intended to proceed on the basis of the impugned notice dated 05.03.2021. Since the structure was not in a ruinous condition and the same could be made habitable by repairing it, it was the responsibility of the owners to carry out necessary repairs and not to demolish the entire structure. A drastic action of demolition of the building was not called for. In that context, the learned counsel placed reliance on the judgment of the Division Bench in Gajanan Ramraoji Ambagovind & Others Versus Corporation of the City of Nagpur & Others [2006(4) Mh.L.J. 789]. The provisions of Section 264 of the Act of 1949 could be resorted to only when the structure was not repairable and not otherwise. Though at present the structure was occupied by three occupants out of eleven, it was necessary to have the structure repaired by following the modalities prescribed under the Act of 1949. Since an absolute discretion was vested with the Municipal Authorities in taking action under Section 264 of the Act of 1949, it was necessary to examine whether the decision to demolish the structure had been taken in accordance with law. To substantiate his contentions in that regard, the learned counsel placed reliance on the decisions in Regional Provident Fund Commissioner Versus Hooghly Mills Company Limited & Others [(2012) 2 SCC 489], Southern Motors Versus State of Karnataka & Others [(2017) 3 SCC 467], Reserve Bank of India Versus Peerless General Finance and Investment Co. Ltd. & Others [(1987) 1 SCC 424], Uttar Pradesh Power Corporation Limited Versus Ayodhya Prasad Mishra & Another [(2008) 10 SCC 139], Franklin Templeton Trustee Services Private Limited & Another Versus Amruta Garg & Others [(2021) 9 SCC 606], Rakesh Kumar Paul Versus State of Assam [(2017) 15 SCC 67] and Tirath Singh

Versus Bachittar Singh & Others [AIR 1955 SC 830]. It was thus submitted that the petitioners were entitled for the reliefs prayed for by them.

5. Shri Jemini Kasat, learned counsel for the Municipal Corporation supported the impugned notice dated 05.03.2021. According to him after following the prescribed procedure, action under Section 264 of the Act of 1949 was taken. Initially notice was issued to the owners of the building to have the same inspected by a Structural Auditor. After the audit report was submitted by the owners the site was again inspected and after due application of mind, the Designated Officer directed issuance of the notice under Section 264 of the Act of 1949 on 05.03.2021. According to him, if the entire structure was in ruinous condition, notice under Section 264(1) of the Act of 1949 could be issued. However, if it was possible to undertake repairs at the said structure then steps could be taken under Section 264(2) of the Act of 1949. It was then submitted that in the light of the subsequent report submitted by the Judgment petitioners, it was decided to obtain a fresh Structural Audit Report from an independent agency. Such report was accordingly obtained from the VNIT which clearly opined that the structure in question was liable to be demolished considering its dilapidated nature. There was no reason to question the action taken by the Municipal Corporation since all steps were taken bona fide and in accordance with law. It was undisputed that the structure was about sixty five years old and most of the petitioners except three had vacated the same. Hence, no interference at the instance of the petitioners was called for.

Shri Nitin Khamborkar, learned counsel appearing for the respondent nos.3A, 3B and 4-Owners supported the stand taken by the Municipal Corporation. It was submitted that after the initial complaint was made by the owners they were directed to obtain a Structural Audit Report. The same was accordingly obtained and in view of the recommendation to demolish the structure, the impugned notice came to be issued. The VNIT as an independent agency had also opined that the entire structure was dilapidated and was thus liable to be pulled down. There was no question of the respondents acting against the interest of the petitioners since it was undisputed that the entire structure was in a dilapidated condition. The tenancy rights of the parties, if any, would be protected as per law. Since majority of the petitioners had vacated the premises, there was no legal justification in entertaining the writ petition at the behest of only three occupants. He too submitted that the writ petition was liable to be dismissed.

6. We have heard the learned counsel for the parties at length and we have perused the documents on record. We have also given due consideration to the respective submissions. Since the validity of Section 433-A of the Act of 1949 has been challenged by the petitioners on the ground that as a notice issued under Section 264 of the Act of 1949 cannot be questioned in any suit or legal proceeding, the said provision prevents an aggrieved party from taking any legal recourse against such notice thus rendering it unconstitutional and liable to be struck down. According to the petitioners, based on a notice issued under Section

264 of the Act of 1949 a structure which otherwise may not be in a ruinous condition or a structure which is not likely to fall or which is not in any way dangerous to any person occupying the premises or passing by such structure would be required to be complied with without there being any scope to examine the satisfaction recorded by the Designated Officer. In other words, complete and absolute discretion is conferred on the Designated Officer and based on his satisfaction which cannot be questioned in any suit or legal proceedings, the aggrieved party would be required to comply with such notice.

7. At the outset, we may note that though a notice issued or an order passed or a direction issued by a Designated Officer under Section 264 of the Act of 1949 cannot be questioned in any suit or other legal proceeding, such bar is not absolute in the sense that if a notice is issued which is a nullity in the eyes of law or the mandatory provisions of the Act of 1949 have not been complied with or if there is an abuse in the exercise of power while issuing such notice, recourse to a civil remedy is not barred. In this regard, we may refer to the judgment of the learned Single Judge in Commissioner, Akola Municipal Corporation Versus Bhalchandra Govind Mahashabde [2013 (4) Mh.L.J. 45] wherein it has been observed in paragraphs 7 and 10 as under:-

"7. Now, Section 433-A of the Maharashtra Municipal Corporations Act creating a bar of jurisdiction of the Civil Court, being relevant, is reproduced below :

"433-A. Bar of jurisdiction. – Save as otherwise provided in this Act, any notice issued, order passed or direction issued by the Designated Officer, under sections 260, 261, 264, 167 or 478 shall not be questioned in any suit or other legal proceedings."

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. Hence, the question of law at Serial No. (i) is answered accordingly.

8. …….

9. …….

10. A plea of bar to jurisdiction of the civil Court to entertain and decide the challenge to a notice under Section 260 of the said Act on the limited grounds, has to be considered having regard to the contentions raised in the plaint, the averments disclosing the cause of action, and the reliefs sought for therein. All such averments must be considered as a whole and not in isolation. The plaint must contain all such statements of material facts, as are necessary to invest such jurisdiction with the Civil Court. The statements of facts must be very clear and specific and not vague. The absence of a single material fact of jurisdiction, would entail the consequences of dismissal of suit, as barred by Section 433-A of the said Act."

This decision of the learned Single Judge has been considered by the Division Bench of this Court in Abdul Karim Ahmed Mansoori Versus Municipal Corporation of Greater Mumbai & Another [2014(1) Mh.L.J. 227] in the context of pari materia provisions of Section 515-A of the Mumbai Municipal Corporation Act, 1888. Under the said provision too, recourse to civil remedy against issuance of a similar notice is barred. Referring to the judgment of the learned Single Judge in Commissioner, Akola Municipal Corporation (supra), the Division Bench observed that the consistent trend and the opinion of this Court was in favour of entertaining a suit subject to such bar and then applying it as and when invoked. The Division Bench agreed with the view taken by the learned Single Judge in the aforesaid decision. Aforesaid two decisions are an answer to the challenge raised to the constitutionality of Section 433-A of the Act of 1949. There is no absolute bar to question a notice issued, order passed or direction issued by the Designated Officer under Section 264 of the Act of 1949 in any suit or legal proceeding and if the aggrieved party is able to get over such bar by pointing the nullity of such notice on the basis of parameters warranting interference by the Civil Court notwithstanding the statutory bar, then such jurisdiction is preserved. It therefore cannot be said that the invocation of a civil remedy is totally barred by Section 433-A of the Act of 1949 and subject to the principles laid down by the Hon'ble Supreme Court as well as this Court, jurisdiction of the Civil Court could be invoked in a given case. That contention of the petitioners therefore cannot be accepted. For aforesaid reasons we are unable to uphold the challenge raised by the petitioners to the constitutionality of Section 433-A of the Act of 1949.

8. Coming to the challenge as raised to the notice dated 05.03.2021 issued by the Municipal Corporation under Section 264(1) of the Act of 1949, we find that initially the land owners obtained a report of the Structural Auditor dated 10.02.2021. After the said report of the Structural Auditor was submitted to the Municipal Corporation, an inspection was undertaken by the Sub-Divisional Engineer, Junior Engineer as well as Civil Engineering Assistant on 22.02.2021. During the course of such inspection they found that the structure was more than sixty five years old and it was in a ruinous condition. The said Officers noted their observations in the file and the entire material was placed before the Designated Officer. The Designated Officer thereafter inspected the structure in

question on 04.03.2021 alongwith the Sub-Divisional Engineer, Junior Engineer and the Civil Engineering Assistant. After recording his satisfaction, the notice dated 05.03.2021 under Section 264(1) of the Act of 1949 came to be issued by the Designated Officer. Thereafter steps were sought to be taken by the Municipal Corporation for seeking police protection and on 27.10.2021 half portion of the dilapidated structure came to be demolished. In the meanwhile some of petitioners who continued in occupation of the portion of the said premises issued a communication on 21.12.2021 alongwith the report of the Structural Auditor which according to them indicated that the remaining structure was not liable to be pulled down and repairs could be carried out. In the light of these two reports with the Corporation, the Designated Officer on 10.03.2022 directed an independent Structural Audit Report to be obtained from VNIT. After the owners paid the requisite amount for carrying out the Structural Audit the structure was inspected by the team of the VNIT and thereafter on 28.07.2022 it submitted its report recommending demolition of the remaining structure since it was in a dangerous and ruinous condition.

From the aforesaid, it becomes clear that the Designated Officer after being duly satisfied that the structure in question was in a ruinous condition directed it to be pulled down in terms of the impugned notice dated 05.03.2021. After half portion of the building was pulled down some of the petitioners obtained a report of the Structural Auditor which did not require the structure to be pulled down. Faced with two contrary reports of the different Structural Auditors, the Corporation rightly obtained a third report from an independent authority. This report of VNIT dated 28.07.2022 justifies the action as directed by the impugned notice dated 05.03.2021.

9. It is well settled that the Court does not possess the requisite expertise to examine the technical and finer details of such reports of the Structural Auditors. The scope for interference with such reports is rather limited. If it has been shown on the basis of an independent report that the action proposed by the Corporation is in accordance with the procedure prescribed and there has been due application of mind by the Designated Officer prior to issuance of such notice, the scope for interference would be limited. In this context we may also refer to the judgment of the Division Bench in Nathubhai Dhulaji a firm & Others Versus The Municipal Corporation, Bombay & Others [AIR 1959 Bombay 332]. While considering challenge to a notice issued under Section 354(1) of the Mumbai Municipal Corporation Act, 1888 which is similarly worded as Section 264(1) of the Act of 1949, the aspect of justiciability was considered. In paragraph 13 of the decision it has been observed as under :-

"13. The other case to which reference may be made is the one reported in Nathubhai Gandabhai v. State of Bombay, 57 Bom L.R 199. At p.201 this is what the learned Chief Justice says:

'Now, when the Legislature leaves the establishment of a fact to the subjective determination of any authority, the Legislature clearly intends that the decision of that authority with regard to the establishment of that fact is final. There must be a mental satisfaction of the authority in question that a particular fact is established. That fact is not a justiciable fact; it is not a fact which has got to be objectively established in a Court of law. If the authority comes to Court and states that it has applied its mind to the particular question and it is satisfied that the fact has been established, the condition is clearly complied with. It is true that the subjective satisfaction must be a genuine subjective satisfaction. It must not be a colourable satisfaction, it must not be a satisfaction influenced by any external considerations, it must not be a satisfaction which is arbitrary or capricious; but if the satisfaction is a bona fide satisfaction, then the Court has no jurisdiction to question the decision and to investigate as to the correctness of the decision arrived at by the authority.'

With respect, we agree with this view."

In that view of the matter the decisions relied upon by the learned counsel for the petitioners do not assist their case.

10. We therefore did not find any reason to hold that the impugned notice dated 05.03.2021 has been issued by the Designated Officer in a manner contrary to the Act of 1949. It is not the case of the petitioners that such notice under Section 264(1) of the Act of 1949 could never have been issued in the facts and circumstances of the present case. We therefore did not find any reason to invoke extraordinary jurisdiction on the grounds urged by the petitioners. The writ petition therefore stands dismissed with no order as to costs. Rule stands discharged. Pending civil applications also stand disposed of.