
(2009) 07 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 28 of 2009

Whiz Enterprise Private Ltd.

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Mumbai Municipal Corporation Act, 1988 — Section 354

Citation : (2009) 07 BOM CK 0015

Hon'ble Judges : Swatanter Kumar, C.J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : A.M. Saraogi, for the Appellant; B.H. Mehta, A.G.P. for Respondent No. 1, Geeta Joglekar, for Respondent No. 2, M.M. Vashi, instructed by M.P. Vashi and Party-in-Person, for the Respondent

Judgement

A.M. Khanwilkar, J.—Heard Counsel for the parties. Rule. Counsel waive notice for respective Respondents. Rule made returnable forthwith by consent. As short question is involved, Petition is finally heard at admission stage.

2. By this Petition under Article 226 of the Constitution of India filed on 6th January 2009, the Petitioners, who are the Developers/Builders engaged by the Respondent No. 3 Society to re-develop the building presently standing on Plot No. 223, Corner of 6th and 11th Road, Khar, Mumbai - 400 052, admeasuring about 870 square yards, pray as under:

a) that this Hon'ble Court be pleased to issue appropriate writ, order and direction directing the Respondent No. 2 to forthwith take necessary steps to prevent loss of life by way of collapse of building by taking immediately steps to evict all the occupants in respect of the said building known as Jeevan Deep Cooperative Housing Society Limited, having their office situated at Plot No. 223, Corner of 6th & 11th Road, Khar, Mumbai 400 052, and shift them in the alternate premises to be made available by the petitioners and/or amounts to be paid by petitioners for temporary alternate accommodation as agreed in the

agreement being already signed with the Petitioners by Society or otherwise take action of demolition in respect of the building as per the Notice in the manner or on such terms as this Hon'ble Court may deem fit and proper and/or take necessary steps as per the orders passed by this Hon'ble Court being the order dated 22/10/2008 passed in Writ Petition No. 2361 of 2008.

b) that interim and ad-interim reliefs in terms of prayer (a) above.

c) for further and other reliefs as the nature and circumstances of the case may require.

3. Briefly stated, the building known as "Jeevan Deep" belonging to the Respondent No. 3 Society is almost 50 years old. Since the building was in a dilapidated condition, the Respondent No. 3 convened General Body Meeting to consider the issue of re-development of the building. The meeting was convened on 3rd February 2008, which was attended by ten members out of twelve members. The Respondents 4 and 5 did not attend the said meeting. In the said meeting, the General Body of the Respondent No. 3 unanimously resolved that the building should be redeveloped instead of undertaking extensive repairs which was unviable. Consequent to the General Body Resolution, the Respondent No. 3 Society entered into Development Rights Agreement with Petitioners herein on 18th April 2008. It is not necessary to elaborate on the terms of the said Agreement except to note that as per the said Agreement, the Petitioners have agreed to provide alternate accommodation in the newly constructed building to the members of the Respondent No. 3 Society in lieu of their present accommodation. Besides, until the construction of the building is in progress, the occupants of the building would be provided suitable rented accommodation. However, later on, it transpired that the premises offered by the Petitioners as transit accommodation were not acceptable to the members of the Respondent No. 3 Society. With the result, it was agreed between the Petitioners and the Respondent No. 3 Society that the members would be compensated with amount towards rent at the rate of Rs. 90 per sq.ft. of carpet area of members' existing flat in the existing building per month for a period of 21 months. Supplementary Agreement to that effect was entered into on 18th April 2008. After the said Agreement, the members/occupants in the suit building were expected to hand over vacant and peaceful possession to the Petitioners to enable the Petitioners to commence redevelopment work of the said building. In the meantime, however, on 2nd May 2008, the Assistant Commissioner of the Municipal Corporation sent notice to the Respondent No. 3 Society in exercise of powers u/s 354 of the Mumbai Municipal Corporation Act to pull down/repair the existing building. The notice provided 20 days time limit to the Respondent No. 3 Society to comply with the following:

1. To repair the water-tank on the terrace above flat No. 10 to stop the leakage.
2. To carry out water proofing on the terrace and parapet wall of the building to stop the leakage during monsoon in flat No. 10.

3. To plaster the internal and external walls of the building to stop leakage through external walls in the building under the supervision of licence structural engineer.

4. Pursuant to the decision of the General Body, the Society submitted re-development plan in relation to the building in question on 18th July 2008 to the competent Authority. The Officers of the Corporation inspected the building and submitted a detailed report to the Executive Engineer (Special), Zone-III dated 15th September 2008 requesting approval for issuance of notice u/s 354 of the Act to provide alternate propping. It appears that after the approval from the Executive Engineer, another notice u/s 354 of the Act was issued on 12th February 2009 to the Secretary of the Respondent No. 3 Society. In the meantime, Petitioners herein had filed Writ Petition 2361 of 2008 before this Hon'ble Court which came to be disposed of on 22nd October 2008 directing the Respondent Corporation to treat the said Writ Petition as representation and to pass appropriate orders within eight weeks from that date. It is noticed that the Respondent No. 3 had appointed Sardar Patel College of Engineering to assess the condition of the building in question. They completed the condition survey of building and the final structural assessment report of the building was prepared and forwarded to the Respondent No. 3 Society under cover of letter dated 1st January 2009. The said report, besides giving graphic description of the condition of the building also refers to the photographs in support of the opinion reached by the experts that the building was in dangerous condition due to age of building and lack of maintenance. The remarks column of the said report reads thus:

Remarks:

The building is in dangerous condition due to age of building and lack of 'maintenance'. Many of the RCC columns, beams and slabs are cracked badly, reinforcement exposed, corroded and broken at most of the places. The staircase beams, slabs including cap slabs have also cracked. The condition of columns, beams, slabs including stair case & cap slabs, chajjas, pardi walls is critical at many locations. Plaster is cracked and fallen at some places. The condition of third floor particularly room no 11 & 12 is very dangerous for inhabitation. The test results also reveal the degradation in the quality of concrete at almost all locations. Terrace waterproofing is also in poor condition. There is heavy leakage and seepage problem observed in the building. The condition of the building is extremely dangerous for the safety of the occupants of the building. Therefore it is recommended to demolish the building and reconstruct the same.

5. As aforesaid, another notice was issued by the Corporation in exercise of powers u/s 354 of the Act on 12th February 2009. The concerned Officers of the Corporation inspected the site and concurred with the opinion recorded in the structural assessment report of Sardar Patel College of Engineering that the re-development of the building would be more appropriate and imperative. Accordingly, the authorities declared the building as dilapidated and extremely

dangerous one and recommended redevelopment of the building. In the interregnum, however, admittedly portion of building collapsed on 4th May 2009. The photographs produced on record along with the affidavit would substantiate that position. Significantly, except the Respondents 4 and 5, all other members/occupants have vacated the building to facilitate re-development work. The Respondents 4 and 5 are opposed to the re-development work. Pursuant to the proposal of re-development submitted by the Respondent No. 3 Society, the Corporation issued I.O.D. on 17th May 2009. Besides, as per the direction given by this Court in Writ Petition No. 2361 of 2008, the competent Officer of the Corporation passed a speaking order on 20th June 2009. The Corporation in the affidavit filed in the present Petition have supported the stand of the Respondent No. 3 Society and that of the Petitioners herein as also the opinion recorded by Sardar Patel College of Engineering to the extent that the building is in a dilapidated condition and needs to be pulled down. However, according to the Corporation, the responsibility to get the premises vacated and to provide alternative accommodation to the occupants of the building is on the Petitioners and the Respondent No. 3 Society. The Petition is, however, opposed by Respondent Nos. 4 and 5 on the basis that it would be unnecessary to demolish the existing building. According to them, the Officers of the Corporation were acting in connivance with the Petitioners and have issued notice for demolition of the building so as to pave way to the Petitioners to re-develop the building.

6. Having considered the rival submissions and going through the pleadings and documents on record, the first question that needs to be addressed is about the condition of the building. That will have to be answered on the basis of the expert's opinion. In that, M/s. Sardar Patel College of Engineering was nominated by the Respondent No. 3 Society, who in turn, after thorough inspection, have submitted structural assessment report which has unhesitatingly concluded that the condition of the building was dangerous and therefore recommended demolition and reconstruction of the building. There is nothing on record to doubt the integrity or the qualification of the experts appointed by the Respondent No. 3 Society. The fact that they were nominated by the Respondent No. 3 Society, does not necessarily mean that they have not given an independent report. The said organisation is a professional one. Moreover, the Officials of the Corporation who are also experts on the subject have concurred with the said opinion. The fact that initially the Corporation issued notice to the Respondent No. 3 to carry out repairs in May 2008, does not militate against the opinion now reached by the Officials of the Corporation that the building is in a dilapidated condition. The fact that the building is in a dangerous condition is reinforced from the collapse of the portion of the building on 4th May 2009. The fact that the portion of the building has collapsed, is indisputable and in fact, has been substantiated by the materials on record. Suffice it to observe that the opinion of the experts reached with regard to the condition of the building being a subjective opinion, it is not open for this Court to substitute its view even if the said opinion suffers from some error here or there. In other words, it is not possible to countenance the

argument of the Respondents 4 and 5 that the building is not in a dangerous condition and that repairs would take care of the situation as is contended.

7. Be that as it may, it is not in dispute that the General Body of the Respondent No. 3 Society has unanimously resolved to take forward redevelopment of the building. That resolution was passed as back as on 3rd February 2008. Consequent to the said Resolution, the Respondent No. 3 Society entered into Development Agreement with the Petitioners on 18th April 2008. Moreover, overwhelming majority of members of the Respondent No. 3 Society have acted upon the said arrangement agreed between Petitioners and Respondent No. 3 and are looking forward to the re-development of the building. It is only Respondent Nos. 4 and 5 are opposing re-development of the building. Significantly, they did not participate in the General Body Meeting to oppose the proposal of the redevelopment. Nor have they chosen to question the wisdom of the General Body reflected in the Resolution dated 3rd February 2008 before appropriate forum. The Agreements entered between the Respondent No. 3 and the Petitioners herein have not been challenged by the Respondents 4 and 5 before Court of competent jurisdiction. Suffice it to observe that the decision of the General body will bind the Respondents 4 and 5 and they are obliged to vacate the existing premises and hand over the same to the Petitioners to enable the Petitioners to redevelop the building as per the Agreement reached between the parties. Assuming that this Court were to take the view that demolition of the building was not essential, even then, in view of the decision of the General Body of the Society that the building should be redeveloped, the Respondents 4 and 5 would be bound by the said decision. In the case of Sanjali Sanjay Kadu and Others Vs. State of Maharashtra and Others, , the Division Bench has taken the view that the minority occupants cannot oppose redevelopment when the same is in the interest of all the occupants and the larger public interest requires that such redevelopment should take place. In that case, the building was not in a dilapidated condition. Even then since 90% of the tenants agreed for redevelopment, the objection of the minority occupants for such redevelopment was negated by the Court. The Respondents 4 and 5, however, would rely on the decision of another Division Bench of our High Court in the case of Gajanan Ramraoji Ambagovind and Others Vs. Corporation of the City of Nagpur and Others, which has taken the view that the Commissioner can act if danger to building appears imminent. However, only because the building appears to be in dilapidated condition, cannot be sufficient to order its demolition. The Court went on to observe that necessary material in support has to be furnished by Officers of Engineering Department to form an opinion in that behalf. There can be no two opinions with regard to the above exposition in this decision. In the present case, however, we have no hesitation in taking the view that there was ample material before the competent officer of the Corporation to arrive at subjective satisfaction about the condition of the building for directing demolition. That position can be discerned from the material on record. As aforesaid, it is not open to this Court to overturn the subjective satisfaction so reached by the

Competent Officers who are experts in their field. This Court cannot substitute its own opinion on the basis of the stand taken by the Respondents 4 and 5 that repairs of the building would subserve the present situation.

8. Be that as it may, in the present Petition, the relief is sought by the Petitioners who are incidentally the Developers/Builders. The fact that the Petitioners are Developers/Builders, will not preclude them from pursuing the limited remedy before this Court for a mandamus against the Corporation to take the notice regarding demolition of the existing building issued u/s 354 of the Act to its logical end in accordance with law. The Respondent No. 3 Society is supporting the cause of the Petitioners though has been named as Respondents in the Petition. The Respondents 4 and 5 cannot be heard on the justness of the proposed action of the Corporation on account of dangerous condition of the building; in absence of challenge thereto by way of appropriate proceedings.

9. The question is: what is the direction that ought to be issued in the present Writ Petition. In our opinion, interest of justice demands that the Respondent Corporation is directed to take the notice issued u/s 354 of the Act to its logical end in accordance with Law, forthwith. The Corporation cannot and ought not to wait indefinitely until the Respondents 4 and 5 vacate the tenements in the suit building in their occupation. Moreover, the fact that the (Respondent No. 3) owners of the building are not in a position to effectuate the Resolution of the General Body or for that matter have expressed inability to demolish the building on account of recalcitrant attitude of the Respondents 4 and 5, cannot extricate the Corporation from exercising its authority to take the notice issued by it u/s 354 of the Act to its logical end in accordance with Law, especially when it has firmly opined that the building is in a dangerous condition, coupled with the admitted fact that the portion of the building has recently collapsed on 4th May 2009. In our opinion, having regard to the subjective satisfaction recorded by the Officials of the Corporation about the dangerous condition of the suit building, it is the duty of the Corporation to undo the mischief lest it would cause damage to the life and property of the occupants therein or to the neighborhood.

10. Accordingly, we allow this Writ Petition by issuing direction to the Respondent No. 2 Corporation to take necessary steps to ensure compliance of the direction issued in its notice u/s 354 of the Act, so that the same is taken to its logical end in accordance with law not later than eight weeks from today. At the same time, the Petitioners herein would be obliged to abide by their obligation flowing from the Agreements entered with the Respondent No. 3 Society for and on behalf of all its members including to provide transit accommodation and/or monthly compensation in lieu of alternative accommodation during the construction/redevelopment period, which benefit would enure to the Respondents 4 and 5 being members of Respondent No. 3 Society. It will be open to the Respondent Nos. 4 and 5 to avail of the said benefit.

11. Petition disposed of on the above terms with no order as to costs.

12. In view of the above order, nothing survives for consideration in Chamber Summons. The same is disposed of accordingly.