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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5069 OF 2015**

Mr. Nitin Baburao Pote	... Petitioner
Versus	
Kalyan Dombivli Municipal Corporation and Ors.	... Respondents

**WITH
CIVIL APPLICATION N.1674 OF 2015 IN
WRIT PETITION NO.5069 OF 2015**

Prakash Kalu Gaikwad	... Applicant
<u>In the matter between</u>	
Mr. Nitin Baburao Pote	... Petitioner
Versus	
Kalyan Dombivli Municipal Corporation and Ors.	... Respondents

Mr. R.S. Apte, Senior Counsel a/w Mr. A.A. Garge i/by Mr. Kashyap Bhalerao, for the Petitioner.

Mr. Raju Digamber Suryawanshi, for the Applicant in CA (Intervenor).

Mr. A.S. Rao, for Respondent Nos.1 to 3.

Mr. V.P. Malvankar, AGP, 'A' Panel, for Respondent No.4.

**CORAM : A.S. OKA &
REVATI MOHITE DERE, JJ.**

DATE : 14th JULY, 2015

PC.

. Heard the learned Senior Counsel appearing for the Petitioner. By this Writ Petition under Article 226 of the Constitution of India, the Petitioner has taken an exception to the notice/impugned

order dated 30th May, 2015 issued by the Kalyan Dombivali Municipal Corporation. The said notice is addressed to one Sachin Dattatraya Pote. The notice relates to illegal construction made within the compound of Shivbhagyashree Co-operative Housing Society as well as illegal construction of a Hall including a mobile phone tower. By the said notice, the said Sachin Dattatraya Pote was called upon to remove the illegal structure in the compound of Shivbhagyashree Co-operative Housing Society as well as the mobile phone tower. He was informed by the impugned order that if he refuses to remove the illegal structures, the same will be forcibly removed by the Municipal Corporation and he will be prosecuted under Section 397 of the Maharashtra Municipal Corporations Act, 1949 (for short “the said Act”).

2. The learned Senior Counsel invited our attention to the Sale Deed dated 31st December, 1996 under which the Petitioner Nitin Bhaurao Pote is shown as one of the purchasers. He invited our attention to the unregistered deed of release executed by the purchasers under the said Sale Deed in favour of the Petitioner. He invited our attention to the order dated 11th September, 2014 passed by the Kalyan Dombivli Municipal Corporation. He submitted that the said Sachin Pote has nothing to do with the structures which are the subject matter of the impugned notice which is a Hall. He submitted that the Petitioner

is not concerned with the erection of mobile tower. He urged that the order dated 11th September, 2014 shows that the structure of the Hall was in existence in 1991. Inviting our attention to the order dated 11th September, 2014 passed by the Municipal Corporation, he submitted that there is nothing illegal about the construction of the Hall and the same can be tolerated. On instructions, he submitted that the Petitioner is willing to apply for regularisation of the said Hall as the construction thereof is not otherwise illegal. He submitted that the order dated 11th September, 2014 itself records that the Hall was in existence in the year 1991. He pointed out that the property in question stands only in the name of the Petitioner in the records of the Municipal Corporation. He, therefore, submitted that the Petitioner being the owner of the structure in question be permitted to apply for regularisation of the offending structure.

3. We have heard the learned counsel appearing for the Municipal Corporation as well as the learned counsel appearing for the Applicant in Civil Application No. 1674 of 2015.

4. It is not in dispute that in respect of the structure subject matter of the impugned order dated 30th May, 2015 on the basis of complaint made by the Shivbhagyashree Co-operative Housing Society,

a notice under Section 260 of the said Act of 1949 was issued to the said Sachin Dattatray Pote who is an elected councillor of the said Municipal Corporation. An order of demolition dated 7th March, 2011 was passed on the basis of the said notice.

5. A Writ Petition was filed by the Applicant in Civil Application No.1674 of 2015. The contention raised in the Writ Petition was that the said Sachin Dattatray Pote has incurred disqualification under Section 10(1D) of the said Act, 1949 as he has carried out illegal construction. The said Petition was contested by the said Sachin Dattatray Pote. One of the contentions raised by him was that the building permission of the year 2001 shows that the structure was in existence. While disposing of Writ Petition No.9213 of 2013, by order dated 9th March, 2015, this Court held that order dated 7th March, 2011 was not challenged by the said Sachin and, therefore, the same continues to operate. Therefore, this Court directed the Municipal Corporation to take action of demolition on the basis of order dated 7th March, 2011. This Court also directed the Commissioner of the Municipal Corporation to consider whether the said Sachin has incurred disqualification under clause (1D) of Section 10 of the said Act of 1949.

6. It will be necessary to make a reference to the contentions raised in this Petition by the Petitioner - Nitin. In paragraph 3, the

Petitioner claims that he is owner of the structure constructed in the compound of Shivbhagyashree Co-operative Housing Society and the plan of the said structure has been sanctioned by the Municipal Corporation in the year 2001. It is pointed out that notice/ impugned order dated 30th May, 2015 has been issued by the Municipal Corporation in terms of the aforesaid Judgment and Order dated 9th March, 2015 in Writ Petition No.9213 of 2013. Further contention raised in the Petition is that the Petitioner is not a party to the said Writ Petition. It is contended that the notice/impugned order dated 30th May, 2015 is not addressed to the Petitioner but to the said Sachin.

7. It is pertinent to note that in this Writ Petition it is not disclosed that the property in question was jointly purchased by the Petitioner along with other persons including the said Sachin. There is no reference in the main Writ Petition to the so called Deed of Release executed by the said Sachin and others in favour of the Petitioner herein.

8. In the additional affidavit filed by the Petitioner on 6th July, 2015, a contention has been raised that though the property in question was purchased by the Petitioner and other six persons including the said Sachin as co-owners, there is an unregistered Deed of Release executed in February, 2011. It is contended that the property in question was

owned by a Public Charitable Trust and order dated 29th May, 1995 was passed by the learned Charity Commissioner, Maharashtra granting permission under Sub-section (1) of Section 36 of the Bombay Public Trust Act, 1950 (for short “BPT Act”) to sell the said property.

9. Along with the additional affidavit, the Petitioner produced a copy of order dated 11th September, 2014. By the said order, penalty imposed under Section 267A of the said Act on the illegal structure has been set aside. The said order records that the structure of the Hall was in use in the year 2007. Section 267A of the said Act provides for a power to impose penalty on illegal construction. The order of penalty was set aside on the application made by the said Sachin as Section 267A was incorporated in the statute after the year 2007. Interestingly, the said order has been passed on the basis of application dated 27th February, 2013 made by the said Sachin Dattatray Pote who is described in the said order as a leader of the Municipal Congress Party. The Petitioner has not produced copy of the application dated 27th February, 2013. Further, in paragraph 8 of the affidavit, the Petitioner has tried to contend that the said Sachin Pote submitted application dated 27th February, 2013 on behalf of the Petitioner only for giving helping hand and in a bonafide manner. The only inference which can be drawn from the fact that application dated 27th February, 2013 was made by the said

Sachin and from the fact that a copy of said application is not produced before this Court is that the said Sachin was claiming right, title and interest in respect of the property in question. The said Sachin has not taken any such stand in the Writ Petition No.9213 of 2013 that he is not the owner of the said property. Though the Petitioner has relied upon the order dated 11th September, 2014 passed by the Municipal Corporation on the basis of application made by the said Sachin, the Petitioner wants to contend that the said Sachin has no right, title and interest in the property in question. Going by the copy of the Sale Deed dated 31st December, 1996 annexed to the additional affidavit of the Petitioner, the said Sachin and four others are the co-owners of the property purchased in the Sale Deed. The so called Deed of Release of February, 2011 is not a registered document and, therefore, it will not affect the right, title and interest of the said Sachin in the property in question. The said document is a compulsorily registrable document under Section 17 of the Indian Registration Act, 1908. Surprisingly, the said Sachin has not raised any such contention on the basis of the so called Deed of Release in Writ Petition No.9213 of 2013 filed by him.

10. Therefore, the contention that the Petitioner is the sole owner of the illegal structure subject matter of the impugned notice/order cannot be accepted. Perhaps, the said contention is sought to be

raised as this Court, by order dated 9th March, 2015, has directed the Municipal Commissioner to consider the issue of disqualification of the said Sachin on the ground that he has carried out illegal construction.

11. Another contention raised by the learned Senior Counsel appearing for the Petitioner is that the Hall in question in respect of which the impugned notice/order has been issued is in existence from the year 1991. We have perused the order of the Charity Commissioner dated 29th May, 1995 granting permission for sale under Sub-section (1) of Section 36 of the BPT Act. The Sale Deed dated 31st December, 1996 has been executed on the basis of the said order of the learned Charity Commissioner. The contention raised by the Trustees in the said application seeking sale permission as reflected from the said order under Section 36(1) of the BPT Act is that the land subject matter of the said order granting sale permission was an agricultural land. It was contended that it was a dry land and fetching no income to the Trust. Thus, the said order does not record that there was a structure of Hall in existence found in the year 1995. Even in the Sale Deed dated 31st December, 1996, there is no reference to the existence of any such structure on the land purchased by the Petitioner and others.

12. Thus, this is a case where order of demolition has been passed by the Municipal Corporation against the said Sachin who was

admittedly a co-owner. The said order of demolition passed in the year 2011 was never challenged by the said co-owner.

13. Now a stand is sought to be taken in this Petition that the structure was in existence from 1991 and that the said Sachin has no right, title and interest in the said structure. Both the factual contentions are not substantiated by the Petitioner. In fact, going by the order of the learned Charity Commissioner, the contention that the structure of the Hall was in existence in 1991 appears to be completely incorrect. The same is the case made out that the Petitioner is the exclusive owner of the structure. As pointed out earlier, on 27th February, 2013, an application was made by the said Sachin in respect of the very structure for waiver of the penalty. Even the said order dated 11th September, 2014 records that except for electricity bill no other material was produced to show that the structure was in existence in the year 1991.

14. Thus, this is a clear case of erection of unauthorised structure. This Petition appears to have been filed with the object of ensuring that the said Sachin who is an elected councillor does not incur disqualification and that is the reason why the Petitioner wants to contend that he is the exclusive owner of the structure and he may be

permitted to apply for regularisation. In the order dated 9th March, 2015 passed by this Court in Writ Petition No.9213 of 2013 filed by the Applicant in Civil Application No.1674 of 2015, it is observed by this Court that the said Sachin did not challenge the order dated 7th March, 2011 of demolition of the same structure.

15. Considering the conduct of the Petitioner, this is not a fit case where interference can be made at the instance of the Petitioner to the extraordinary jurisdiction under Article 226 of the Constitution of India. We, accordingly, reject the Petition. Civil Application No.1674 of 2015 does not survive and the same stands disposed of.

(REVATI MOHITE DERE, J)

(A.S. OKA, J)