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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.3036 OF 2014

Pali Hill Tourist Hotel Pvt. Ltd.

... Petitioner

Vs.

The Municipal Corporation of Greater
Mumbai and Anr.

... Respondents

Mr. Rahul Rao i/by M/s. Dahibawkar & Co., for the Petitioner.

Mr. S.U. Kamdar, Senior Counsel a/w Ms. K.R. Punjabi, for the
Respondent - BMC.

**CORAM : A.S. OKA &
A.K. MENON, JJ.**

DATE : 16th FEBRUARY, 2015

PC.

. Heard the learned counsel appearing for the Petitioner. By this Petition under Article 226 of the Constitution of India, the Petitioner has challenged the legality and validity of a notice dated 15th July, 2014. The notice is in relation to erection of temporary monsoon shed, the description of which is set out in the Schedule to the said notice which reads thus :-

“Schedule

Unauthorized erection of temporary monsoon shed at Hotel Olive with wooden bamboos and plastic sheet roofing on the front side adm. 21 mtr x 3.50 mtr and on the side 11 mtr. X 5 mtr.”

The notice issued by the first Respondent alleges that the monsoon shed is illegal.

2. The learned counsel appearing for the Petitioner submits that on 4th June, 2014, an application was made by the Petitioner for grant of permission to construct temporary monsoon shed for the period from 1st June, 2014 to 30th October, 2014. He submits that as there was no reply issued to the said application by the first Respondent – Municipal Corporation, the Petitioner constructed the monsoon shed. He relies upon the policy dated 3rd June, 1991 of the first Respondent – Municipal Corporation which permits permission to be granted for erecting temporary monsoon sheds. He urged that on 31st July, 2014 the first Respondent belatedly communicated to the Petitioner an order of rejection of the said application. He pointed out the manner in which an attempt was made by the Municipal Corporation to demolish the monsoon shed. He invited our attention to the observations made in order dated 5th August, 2014 passed by the Division Bench of this Court. He submits that an illegality has been committed by first Respondent – Municipal Corporation. He submitted that permission may be granted to challenge the order dated 31st July, 2014.

3. The learned counsel appearing for the Petitioner states that though he has not received any instructions from the Petitioner, a letter dated 5th November, 2014 addressed by the Petitioner to the Assistant Engineer (Building and Factory) of the first Respondent records that the monsoon shed has been removed. The learned Senior Counsel appearing for the Municipal Corporation, on instructions of the Officer who is present in the Court, states that monsoon shed has not been removed.

4. We have considered the submissions. It will be necessary to make a reference to the averments made in paragraph 10 of the Petition which reads thus :-

“10. For the year 2014, the Petitioner had applied on 24th May 2014 for the temporary monsoon shed permission for the year 2014. The Respondents failed and neglected to reply to the same. The Petitioner put up the monsoon shed before the rains started in anticipation of the permission from the Respondents. The Petitioner is ready and willing to pay the necessary charges for the same. Hereto annexed and marked as “**Exhibit “M”**” is a copy of the application dated 23rd May 2014 by the Petitioner to the Respondents for the temporary monsoon shed permission. The Petitioner craves leave to refer to and rely upon the photographs of the disputed structure as and when produced.”

5. Thus, it is an admitted position that according to the case of the Petitioner, an application was made on 24th May, 2014 for grant of permission to construct the monsoon shed and though a permission

was not granted by the Municipal Corporation, in anticipation of grant of permission, the Petitioner proceeded to erect the monsoon shed. Thus, it is an admitted position that though there was no valid permission granted, the Petitioner constructed the monsoon shed. Though the Petitioner has claimed in paragraph 10 that the application was made on 24th May, 2014, Exhibit 'M' to the Petition shows that application dated 23rd May, 2014 was delivered in the office of the concerned Assistant Engineer on 4th June, 2014. Significantly, the Petitioner has not disclosed in the Petition the date on which the monsoon shed was erected. Thus, this Court is dealing with a case where the Petitioner after making a belated application on 4th June, 2014 proceeded to construct the monsoon shed without permission of the first Respondent – Municipal Corporation. The application made by the Petitioner discloses that the Petitioner intended to construct a temporary monsoon shed having large area of 374 Square Meters.

6. Remedy under Article 226 of the Constitution of India is always a discretionary and equitable remedy. Such remedy cannot be allowed to be invoked by a person who has admittedly carried out construction of a huge monsoon shed without permission of the first Respondent – Municipal Corporation.

7. It is pertinent to note that though the Petitioner claims that the order of rejection was served upon it on 31st July, 2014 and though the Petition appeared repeatedly before this Court, at no stage, the Petitioner made any attempt even to seek leave from this Court to amend the Petition and to challenge the said order.

8. The observations made by the Division Bench in the order dated 5th August, 2014 are made in a Notice of Motion taken out by the Petitioner. In the present case, the conduct of the Petitioner is such that he is dis-entitled to invoke the extra ordinary remedy under Article 226 of the Constitution of India. There is a serious dispute whether the monsoon shed subject matter of the impugned notice has been removed by the Petitioner. It is obvious that if the said monsoon shed continues to exist as of today, it will be open for the first Respondent to forthwith take action of demolition of the said monsoon shed. Subject to what is observed above, the Petition is rejected.

(A.K. MENON, J)

(A.S.OKA, J)