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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10206 OF 2011

Shubhmangal Builders

... Petitioner

Versus

Mr. Ashok Ambadas Gangane & Ors.

... Respondents

Mr. Umesh R. Mankapure, for Applicant & for the Petitioner.
Mr. Ajay S. Patil, for Respondent No.1.
Mr. Abhijit P. Kulkarni & Mr. Manoj Badgujar for Respondent Nos.
4 & 5.

**CORAM: A.S. OKA AND
 RIYAZ I. CHAGLA, JJ.**
DATED: 11TH APRIL 2018.

ORAL JUDGMENT (Per A.S. Oka, J.)

1. On the earlier date, parties were put to notice that Writ Petition will be taken up for final disposal which is already admitted. The Petitioner in this Petition under Article 226 of the Constitution of India claims to be the owner of the property (CTS No. 380, Narayan Peth, Pune) subject matter of the Petition which is more particularly described in paragraph 3 of the Petition. In this Petition, we are concerned with a small structure on a portion of the said property admeasuring 20 feet X 20 feet which is in possession of the Respondent Nos. 1 to 3. A notice of demolition under Section 478 (1) of the Maharashtra Municipal Corporations

Act, 1949 (for short “the said Act”) was issued by the Pune Municipal Corporation (in short “said Corporation”) in the year 1997 in respect of the said structure. It appears that the Respondent No.1 filed a Suit for challenging the said notice in the Civil Court at Pune. The learned Trial Judge while deciding the Suit came to the conclusion that the notice and the subsequent letter issued on the basis of said notice were illegal. An Appeal was preferred by the present Petitioner as well as by the said Corporation before the District Court. The said Appeals were allowed on 23rd November 2005 and the judgment and decree of the Trial Court was set aside and Suit filed by the Respondent No.1 was dismissed. It appears that an officer of the said Corporation on 28th March 2008 addressed a letter to the Respondent No.1, stating that subject to the condition of withdrawing the second Appeal preferred by the Respondent No.1 against the aforesaid decision of the District Court as well as subject to the condition of withdrawing the other legal proceedings, the said Notice dated 13th February 1997 will be withdrawn. Therefore, on 3rd April 2008, the first Respondent withdrew the second appeal. Accordingly, the said notice was withdrawn. The challenge in this Petition is to the action of the Municipal Corporation of withdrawing the notice dated 13th

February 1997.

2. The submission of the learned counsel appearing for the Petitioner is that there is no finding recorded by any officer of the Municipal Corporation that the structure subject matter of the said Notice was lawfully constructed. He submitted that on the contrary, the finding of the District Court in the Appeal preferred by the said Corporation itself was that the Notice dated 13th February 1997 was legal and valid. He invited our attention to the report submitted by various officers of the said Corporation in which there was a recommendation not to withdraw the notice as the construction of the structure subject matter of the notice was illegal and was in the set back portion. He submitted that pending the second appeal, the Municipal Corporation purported to act upon legal opinion of an Advocate and decided to withdraw the said notice. His submission is that in the light of the finding of the District Court that the structure subject matter of the notice was completely illegal, the action of withdrawal of the notice is completely illegal. He pointed out the annexures to the Affidavit in Reply filed by said Corporation of Shri Vivek Madhukar Kharwadkar.

3. On a query made by the Court, he stated on instructions that the when the Petitioner applied to the said Corporation for

grant of development permission, on the plan submitted for approval, the Petitioner himself had shown the structure subject matter of the notice as “to be retained”. He stated that development was completed on the basis of the same plan which was sanctioned and an occupation certificate has been granted. He submitted that the remark “to be retained” was made on the plans in view of the pendency of appeal in the District Court. He submitted that withdrawing such a notice is an abuse of process of law.

4. We heard the learned counsel appearing for Respondent No.1 as well as the counsel appearing for Respondent No.5. We have perused the Petition, its annexures and Affidavits on record.

5. It is an admitted position that the Petitioner who was a party to the Suit had preferred an Appeal against the decree of the Civil Court by contending that the structure subject matter of the said notice was illegal. But the Petitioner showed the same structure in the building plans subsequently submitted by him to the Municipal Corporation as “to be retained”. The said plans were approved by granting development permission on which the Petitioner has acted upon and has constructed a building.

6. In none of the documents which are placed on record, we

find that any of the officers of the said Corporation had come to the conclusion that the structure subject matter of the said notice was legal. However, it is noted that in various notings which are produced on record that a plan for grant of development permission was submitted by the Petitioner by showing the said structure as “to be retained” and the said plan was sanctioned. In fact the legal opinion which is annexed to the Affidavit of the Municipal Corporation specifically records that in view of the sanction of the plan and in view of the provisions of the Development Control Regulations, the notice has become redundant. Thus, the Municipal Corporation seems to have acted on the basis of the legal opinion. Moreover on the basis of the representation of the Municipal Corporation, the Second Appeal preferred by the first Respondent was allowed to be withdrawn by the Respondent No.1 by the order dated 3rd April 2008, which mentions that the Appeal has been withdrawn on the basis of subsequent events.

7. Considering the conduct of the Petitioner of showing the structure as “to be retained” in the plan and considering the fact that the Petitioner has acted upon said plan and has constructed a building, this is not a fit case where interference can be made with the decision of the Municipal Corporation of withdrawing the

notice at the instance of the Petitioner. But, the decision of withdrawal does not mean that the Municipal Corporation has held the structure to be legal or that the structure could be tolerated.

8. If the structure is illegal and if the structure is on set back area, which is causing obstruction to the road, the Municipal Corporation, notwithstanding withdrawal of the earlier notice can always take an action of removal / demolition of the structure in accordance with law.

9. Subject to what is observed above, no case for interference is made out.

10. Writ Petition is rejected and pending Civil Application does not survive. Rule is discharged. No costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J)