

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

APPEAL FROM ORDER NO. 450 OF 2018

Twinkle Winkle LLP V/s. Designated Officer, Asst. Engineer (Building and Factories) & Ors.	...	Appellant Respondents
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- Mr.Amogh Singh i/b. Mr.Dhirendra Pratap Singh for the Appellant.
- Mr.Rajiv Chavan, Senior Advocate a/w. Ms.Priyanka Chavan, Ms.Anupama Pawar, Ms.Sumangala Yadav i/b. Mrs.Madhuri More for Respondent Nos.1 and 2-MCGM.
- Ms.Tanaya Goswami, AGP for the Respondent No.3-State.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 28th JANUARY, 2019.

P.C. :

1] Heard learned counsel for both the parties.

2] This appeal takes an exception to the order dated 16/07/2018 passed by the City Civil Court, Borivali Division Dindoshi, Mumbai, thereby refusing the ad-interim relief in Draft Notice of Motion in L.C. Suit No.1959 of 2018.

3] The said Notice of Motion was taken out by the Appellant herein to restrain the Respondent-Corporation and the State Government from taking any action in pursuance of the Notice issued under Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 (*for short, "MRTP Act"*).

4] According to the Appellant, by the impugned Notice, he was called upon to remove the following structures on the count that they are illegal and unauthorized ;

- "1) Unauthorized construction of brick masonry wall in the compulsory open space & same is covered with shed supported on M.S. Angles admeasuring 9.50 m x 14.30 m x 3.40 m.*
- 2) Unauthorized construction of room over terrace of first floor by glass partition and A.C. Sheet shed admeasuring 3.5 m x 3.0 m x 3.0 m.*
- 3) Unauthorized erection of shed over terrace by M.S. Pipes & Fiber sheet roof admeasuring 8 m x 9 m x 3.20 m.*
- 4) Unauthorized change of user from school to commercial activity i.e. Amusement Center.*
- 5) Unauthorized construction of wall in the compulsory open space by brick masonry wall at entrance admeasuring 8.30 m. x 2 m (ht.)."*

5] It is the submission of learned counsel for the Appellant that the Appellant had already removed the structure Nos.2 and 3.

6] As regards structure No.4 i.e. unauthorized change of user from school to commercial activities i.e. the Amusement Center, learned counsel for the Appellant is relying on the Lease Agreement produced at page 68, where-in Clause No.3, it is stated that "*the Licensee will use the said premises for carrying its business activities based Education and Kids Play Area*". The photographs are produced on record by learned counsel for the Appellant to submit that the activities, which are presently carried on in the suit premises are of educating the slum dwelling children and for that purpose running some play garden type area. It is urged that there is no change of activities as alleged in the impugned notice from school to commercial activity. The amusement center is a sort of play area for the children and not amusement center in strict sense of the term and therefore there is no question of change of user.

7] As regards the unauthorized structures described at Sr. Nos. 1 and 5 of the notice, it is submitted that the construction of walls is carried out in the open space and is in existence since last more

than 20 years and the construction is not unauthorized as such, as the Appellant has already applied for the regularization of the sub-division of the said plot and if it is allowed, then the construction of the walls will not become illegal or unauthorized. It is submitted that the proposal for sub-division is already submitted by the owner along with requisite documents. In light thereof, the submission is advanced that till the said proposal is decided, the construction needs to be protected. It is submitted that at this ad-interim stage when the Notice of Motion is also pending before the trial Court and the reply to the said Notice of Motion is yet not filed by the Respondent-Corporation, the demolition of the construction should not be permitted.

8] Reliance is placed by learned counsel for the Appellant on the judgment of this Court (Nagpur Bench) Second Appeal No.491 of 2012 in the case of *Kishor s/o. Ramalu @ Rambhau Telang Vs. The Municipal Commissioner, Nagpur Municipal Corporation, Nagpur, dated 20/01/2015*, to submit that the impugned notice issued in this case is not complying with the requisite period as laid down in the said section. Further, it is submitted that if such proposal for regularization is pending before appropriate authority, then at-least till that proposal is decided, the structure needs to be protected.

9] Per contra, learned counsel for the Respondent-Corporation has submitted that the proposal, which is alleged to be submitted for the sub-division, is not at all complying with the necessary requirements. The attention is drawn to para No.7 of the Affidavit filed on record on behalf of Respondent No.3-the City Survey Officer, wherein it is stated that before making application for sub-division of the property, the Appellant is required to approach the Municipal Corporation of Greater Bombay, to take appropriate permission from them, annex the said permission and make appropriate application to this defendant after complying with the requisites as stated.

10] It is submitted that in the present case, no such permission from the Corporation is obtained and in that view, the very proposal made for the sub-division also cannot be considered.

11] Learned counsel for the Appellant has therefore relied upon the list of documents at page No.125 to show that such compliance is made, the proposal is already made on 14/06/1993, the documents along with same are submitted on 12/07/2018 giving the requisites to the City Survey Officer and that proposal is yet not decided.

12] According to learned counsel for the Respondent-Corporation, it may take substantial period for deciding this proposal for sub-division of the plot and till then the construction which is apparently unauthorized and illegal and which is not reflected in the sanctioned plan cannot be protected and hence in his submission, the trial Court has rightly rejected the ad-interim relief.

13] In my considered opinion also, if according to the Appellant, the proposal was already made for sub-division, then he should have waited till the said proposal was approved, so that the construction of the walls would not have been called as illegal or unauthorized. Admittedly, the construction of these two walls is not reflected in the sanctioned plan and it is not the case of the Appellant that subsequent to the plan sanctioned, he has obtained any permission for construction of these walls.

14] In that view of the matter, when the construction is patently unauthorized and illegal, as per the own case of the Appellant, now merely because he has made the proposal for sub-division of the plot, such construction cannot be protected. Ultimately, after the proposal for the sub-division of the plot, if allowed, then he

has to apply to the Municipal Corporation for getting the requisite permission and thereafter getting the plan sanctioned. Without that he cannot make construction of the walls. Hence, when the construction is *prima-facie* shown to be illegal and unauthorized, by the order of the Court such construction cannot be protected. Therefore, no fault can be found in the impugned order passed by the trial Court rejecting the ad-interim relief.

15] In Appeal from such discretionary order, no interference is warranted. Hence, the Appeal stands dismissed.

16] At this stage, learned counsel for the Appellant, on instructions of the Appellant, who is present in the Court, makes a statement at bar that within the period of 15 days from today, the Appellant will himself demolish the said structure on his own.

17] Therefore, subject to condition of the Appellant filing such undertaking within two days, the order of ad-interim relief, granted by this Court during the pendency of the Appeal, is extended till 11th February, 2019. In case of failure on the part of the Appellant to file such undertaking or after filing of undertaking on failure to demolish the walls on his own till 11th February, 2019, the order of ad-interim

relief will stand vacated without further reference to this Court and the Respondent-Corporation is then at liberty to take the necessary action of demolition.

[DR.SHALINI PHANSALKAR-JOSHI, J.]