

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

**NOTICE OF MOTION NO.133 OF 2019
IN
WRIT PETITION (L) NO.1034 OF 2019**

Boman Rustom Irani ... **Applicant/
Orig.Petitioner**

In the Matter Between :-

Boman Rustom Irani ... **Petitioner**

Vs

**The Municipal Corporation of
Greater Mumbai** ... **Respondent**

Mr.M.M.Vashi, Senior Advocate a/w
Ms.Prachi Khandge I/b M.P.Vashi and
Associates for the Applicant/Petitioner.

Mr.J.F.Reis, Senior Advocate a/w
Ms.Kejali Mastakar for the Respondent.

Mr.H.S.S.Murthy I/b Swati Gautam for
Rustomjee Regency Co-Operative Housing
Society Limited for the Intervener.

Mr.Rohan N. Purte, Assistant Engineer (B
& F) R/North Ward present.

Mr.Aviket Chaudhari, Sub-Engineer (B &
F) R/North Ward present.

**CORAM :- S. C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.**

DATE :- APRIL 2, 2019

P.C. :-

1. This Notice of Motion was listed on our Board. With the consent of both sides, we have heard it finally.

2. Pertinently, an attempt is made to intervene at the hearing of this Notice of Motion and it is stated that the intervention is by some of the complainants, who have approached the Municipal Corporation, complaining that the Co-operative Housing Society has noticed a construction of a wall and which wall is constructed by the builder, but it is unauthorised.

3. We clarified to Mr.Murthy appearing in support of this intervention application that the remedy of the interveners is not to intervene in this proceeding and particularly bearing in mind the prayers of the Notice of Motion. Leaving all the contentions of the interveners and the remedies open, we do not take any notice or cognizance of the intervention.

4. The Notice of Motion is pressed for the following three reliefs:-

“(a) That the respondent be ordered and directed to disclose the name of the officer, who was present in court on 29th March, 2019 when the above writ petition was heard and order was passed as well as the officers, who are responsible for violating the order dated 29th March, 2019 for having carried out demolition of the wall in question.

(b) that the respondent be ordered and directed to reconstruct the wall at their own cost having the same

length, width and height as shown in the photograph, which is annexed at Exhibit-C

(c) In the alternative, the petition may be permitted to reconstruct the wall having same length, width and height as shown in the photograph, which is annexed at Exhibit-C, subject to the petitioner recovering cost of reconstruction from the respondent and its officers.”

5. In the affidavit in support, the petitioner has stated as under :-

“1. I say that I have filed the above writ petition challenging the impugned notice dated 12th January, 2019 and impugned order dated 18th March, 2019. I say that under a covering letter dated 27th March, 2019, which was served on 28th March, 2019 and a copy of writ petition was served on R/North Ward office. Hereto annexed and marked **Exhibit “A”** is a copy of the said notice dated 27th March, 2019.

2. I say that a similar notice was served upon the head office of the respondent informing the respondent that the matter will be mentioned on 28th March, 2019 at 11 a.m. for production of papers of the above writ petition at 3.00 p.m. on 28th March, 2019. Hereto annexed and marked **Exhibit “B”** is a copy of said letter.

3. I say that pursuant to the above mentioned two notices, an application was made before the Division Bench of their Lordship Hon’ble Mr.Justice S.C.Dharmadhikari and Mr.Justice B.P.Colabawalla at 11 a.m. On 28th March, 2019 for production of papers at 3 p.m. However, on 28th March, 2019 at 3 p.m. full bench was going to hear another matter, the Division Bench was pleased to grant production of papers at 1.45 on 28th March, 2019.

4. On 28th March, 2019, the matter could be called out only at about 2.15 p.m. Therefore, the matter was kept on production board at 11 a.m. on 29th March, 2019 when the concerned officer from R North Ward was present in court from 11 a.m. After hearing the counsel appearing for me and the advocate appearing for the respondent, the Division Bench was pleased to pass an order recording my statement that I will make an application for regularization of the wall within two weeks. Therefore, the respondent was restrained from the date of the order and till the said

application is decided, the respondent will not demolish the wall in question. I say that after the said order was passed, the officer of the respondent came to the site and demolished the wall in question. It is pertinent to note that if the wall was demolished prior to the passing of the order, the concerned officer of R North ward would have instructed the advocate appearing for the respondent to so inform the court. However, no such instructions were given by the concerned officer of R North ward.

5. I say that even assuming that the officers of R North Ward had proceeded to go to the site to demolish the wall in question, even the said fact would have been pointed out by the advocate appearing for the respondent on instructions from the said concerned officer of R North ward. However, no such instructions were given by the concerned officer of R North ward, who was present in court.

6. It is pertinent to note that the wall in question was 35.50 mt. in length, 0.30 mt. in width and 2.13 mt. in height. Hereto annexed and marked **Exhibit "C"** is a photograph showing the said wall."

6. We have heard Mr.Vashi, learned senior counsel appearing in support of this Notice of Motion and Mr.Reis, senior counsel appearing, on notice, on behalf of the Municipal Corporation.

7. After hearing both sides, we are of the opinion that the least that was expected from the respondent and particularly, from its officials present in the Court, was an assistance to the Court. Ultimately, the officers appointed to represent the Corporation before this Court may be employed by the Corporation but nonetheless they are its advocates. They are first and foremost officers of this Court. The officials of the respondent instructing its advocate should have promptly pointed out, and when the

order was being dictated in open court, that there is a request made to seek police protection, that is already granted, the demolition squad is ready and has reached or likely to reach the site. Thereupon the Court may have passed appropriate orders, but finding that there was no assistance, the Court had no occasion to seek any answers or raise any queries to the official present in the Court.

8. Once this Court was not informed as above, then, we are clear in our mind that what matters in such cases is the sanctity and purity of judicial process. This Court, after hearing Mr. Vashi and the advocate appearing for the respondent, on 29th March, 2019 had passed the following order :-

“Mentioned. Not on Board.

2 After having heard Mr. Vashi, the learned Senior Counsel appearing on behalf of the Petitioner and with his assistance perusing the Writ Petition and particularly the impugned order, we are of the firm opinion that reading of the notice itself offers adequate protection to the Petitioner and balances the rights and equities.

3 The impugned order/notice, a copy of which is at Exhibit-J, pages 86 and 87 of the Petition with its Schedule, reads as under:-

*“NOTICE UNDER SECTION 53 (1) OF THE
MAHARASHTRA REGIONAL AND TOWN PLANNING ACT,
1966.*

*Notice No. RN/DOIRN/008/53-1-MRTP Act/RN13N01/12-01-
2019 Date:12/01/2019*

Ref No. 82829

To,
Owner/Occupier of Irani's Bungalow,
Adjoining to Rustomjee Regency,
JS Sawant Marg,
Borivali West,
Mumbai,
Maharashtra 400068,
India

Sir/Madam,
WHEREAS the undersigned has been appointed as an officer for the purpose of section 152(1) of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter the brevity sake referred as the said Act).

AND WHEREAS the undersigned has been empowered to exercise and perform the powers and functions of the Planning Authority under section 53 of the said Act.

And WHEREAS it has been reported to me that, you have commenced, undertaken, or carried out development or institute or changed the use of the land described in the Schedule appended below:-

1. Without the permission required under the Act.
2. Which is not in accordance with the permission granted.
3. After the permission for development was duly revoked.
4. In contravention of the permission which was duly modified.

You are, therefore, hereby called upon:

To restore the compound wall constructed as per MCGM approved plan No. CHE/1686/LOR Situated at Irani's Bungalow, Adjoining to Rustomjee Regency, JS Sawant Marg, Borivali West, Mumbai, Maharashtra 400068 India.

OR

apply under section 44 of M. R. T. P. Act for retention of the work before the Competent Authority i.e. Executive Engineer (Building Proposal) City of M. C. G. M. within one month from receipt of this notice.

Please note that on failure to comply with the aforesaid requisition, you will be liable for prosecution under the said Act and the aforesaid requisition will be carried out at your risk and cost.

SCHEDULE

(Description of the unauthorized development together with the particular of land) Unauthorized construction of compound wall."

4 A perusal thereof leaves us in no manner of doubt that the Municipal Corporation has resorted to Section 53 (1) of the Maharashtra Regional and Town Planning

Act, 1966 (for short “the MRTP Act”). Sub-section 3 of that Section reads as under:-

“Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, and pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use.”

5 A perusal of this provision would reveal that there is an alternate and equally efficacious remedy available to the Petitioner and secondly there is an inbuilt protection. Mr. Vashi, on instructions, says that an application in terms of this provision will be made as expeditiously as possible and in any event within two weeks from today.

6 On receipt of the application, all consequences in law will follow. To enable the Petitioner to make such an application, we direct that for a period of two weeks, the wall/ construction shall not be demolished. Once the application is received, then subsection 3 of Section 53 of the MRTP Act would operate with full force.

7 We clarify that we have not expressed any opinion on the rival contentions. The order is passed without prejudice to the rights and powers vested in the Municipal Corporation. Meaning thereby, once the application is received and acknowledged, the wall/construction cannot be demolished until a decision is taken on the application.

8 Needless to clarify that if no application is made, the notice can be taken to its logical conclusion. Secondly, Mr. Vashi says that the moment the application is made under the above provision, the Petitioner will withdraw the Suit pending in the City Civil Court. The Writ Petition is disposed off.”

9. Once the demolition was carried out swiftly and promptly, giving no opportunity to this Court to consider as to whether it is completed or the wall is partially demolished, then, the mandate

of the law is that the party who has suffered adverse consequences, ought to be placed in the same situation and prevailing before the impugned high handed action. By the process of restitution under Section 144 of the Code of Civil Procedure, 1908 or analogous provisions, such party ought to be granted the relief. The party must be restored to the same position as he was, when he sought to protect his legal rights by an order and direction of this Court and was granted the protection. Ultimately, it is the order of the Court, which had to be obeyed and if we find that it was also granting liberty to the petitioner to apply for retention of the wall at the same place, then, all the more, such an order could not have been defeated or frustrated. The very object and purpose of the same is to protect the status-quo at site pending litigation. The Court adjudicates and determines the act of the party to be illegal or unauthorised. Nobody should takeover that exercise. It can be carried out only by the Court. It is in that view of the matter that we are passing the following final order on this Notice of Motion.

10. We clarify that it is without prejudice to the rights and contentions of all parties and, particularly, Rustomjee Regency Co-Operative Housing Societies Association Limited. They can bring in an appropriate action in a competent court seeking to

restrain the present petitioner from either violating provisions of law or interfering with right, title and interest claimed by this Societies Association in the land and the adjoining area.

11. The Notice of Motion is disposed of with the following directions:-

(a) In the event, the petitioner seeks to construct a wall at the same place and of the same size and dimension styled as a “compound wall”, the same may be allowed to be constructed within a period of one week from today.

(b) If that wall is constructed, then, the petitioner can, within two weeks thereafter, seek a relief of retention of the said wall at the site and alongwith the application for seeking retention, the petitioner will produce all the relevant documents or records or certified true copies thereof.

(c) The Corporation shall take decision on this application within four weeks from its receipt.

(d) We clarify that we have not expressed any opinion on the merits, but our order on the Notice of Motion as also the earlier order on the petition only takes care of the anxiety and apprehension of the petitioner that coercive action will be taken

and demolition will be carried out high handedly. It is only that aspect which is taken care of equally by this order.

(e) If the petitioner does not make any construction, though liberty is granted to do so, then, the only step the Corporation should take and in accordance with law is to treat the application, particularly, the application, copy of which is at page 88 of the paper-book, namely, application dated 19th February, 2019, as an application within the meaning of sub-section (3) of Section 53 of the Maharashtra Regional and Town Planning Act, 1966. It should allow the petitioner to produce all the documents and records in support of the version set out in the application. The application shall be decided by the Deputy Chief Engineer, Building Proposals, Western Suburbs II of the Mumbai Municipal Corporation, within the time stipulated above.

(f) The Notice of Motion is allowed in the aforesaid terms.

(g) If the petitioner does not construct a wall within the time specified above, the benefit of para 11(a) of this order cannot be claimed by the petitioner.

(h) Needless to clarify that no equities can be claimed by the petitioner.

(i) In the event, the wall as it stood earlier had wicket gate, then, the petitioner may construct a wall pursuant to our liberty with identical dimension and with such wicket gate.

12. Further it is only because of the fair stand taken by Mr.Reis, learned senior counsel appearing for the Municipal Corporation that we do not direct any action to be taken against the municipal officials or institution of any inquiry into their alleged misconduct.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)