

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

rpa

WRIT PETITION NO.11239 OF 2012

Samsung India Electronics Pvt. Ltd. & Anr.

.. Petitioners

Vs.

The Thane Municipal Corporation & Ors.

.. Respondents

....

Dr.Virendra Tulzapurkar, Senior Advocate a/w. Mr.Amit Jamsandekar, Mr.S.Shrivastava i/b. M/s.D.H. Law Associates, Advocate for the Petitioners.

Mr.A.A. Kumbhakoni, Senior Advocate i/b. Mr.N.R. Bubna, Advocate for Respondent Nos.1 to 3.

Mr.V.S. Gokhale, AGP for Respondent No.4.

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**CORAM : A.S. OKA &
A.P. BHANGALE, JJ.**

DATED : APRIL 1, 2015.

P.C. :

Heard the learned senior counsel appearing for the petitioners and the learned senior counsel appearing for the 1st to 3rd respondents. The learned senior counsel representing the 1st to 3rd respondents has raised a preliminary objection. He invited our attention to the Writ Petition No.7038 of 2012, filed by the Petitioner, the prayers made therein and the order passed thereon. He submitted that in view of the order passed in the earlier Writ Petition, the challenge in the present Writ Petition cannot be entertained on merits.

2 Before we deal with the submissions made by the learned senior counsel appearing for the petitioners on the preliminary objection, it will be necessary to make a reference to the facts of the case in brief.

3 It is contended in the petition that the first petitioner company is engaged in the business of manufacture and sale of sophisticated electronic goods, gadgets and household appliances. It is contended that the first petitioner has entered into various dealership agreements with the respective shop owners all over India including in the city of Thane. It is contended that the first petitioner conducts its retail business of selling cell phones, electrical items etc., through such shops. It is alleged that the respective dealers/shop keepers on their display or sign boards outside the shops or on the shops, display the details of their shops and nature of the product of the first petitioner company available with such shops and the nature of trade or business of the product of the company carried out in such shops. The first challenge in this petition is to the notice dated 19th March, 2012. The said notice was issued by the first respondent Municipal Corporation alleging that sky signs/boards have been displayed by the petitioners without obtaining permission of the first respondent Municipal Corporation under the provisions of

Sections 244 and 245 of the Mumbai Municipal Corporation Act, 1949 (hereinafter referred to as “the said Act of 1949”, for short) and the Rules framed thereunder. The notice alleges that the petitioners have displayed on various shops about 65 advertisement boards nearly of an area of about 15' x 4' without obtaining permission under Sections 244 and 245 of the said Act of 1949 and the Rules of 2003 framed thereunder. By the said notice, the petitioners were called upon to remove the sky sings/advertisements and to deposit necessary fees.

4 The second challenge in this petition is to the notice dated 19th July, 2012. The said notice is similar to the notice dated 19th March, 2012. It relates only to one advertisement having the size of 40' x 4'. Writ Petition No.7038 of 2012 was filed by the Petitioners in this Court for specifically challenging the same notices dated 19th March, 2012 and 19th July, 2012. The said Writ Petition was disposed of by the order dated 1st October, 2012 passed by a Division Bench of this Court. The said order reads thus:

“1 The Petitioners have submitted a representation on 25 June 2012 for regularization of 36 signages in the jurisdiction of Thane Municipal Corporation. The Petitioners sought information on the procedure for regularization but in the

meantime, an order was passed on 29 June 2012 by the Joint Municipal Commissioner (Advertisement Department), directing the removal of the hoardings. We are of the view that since the Petitioners have sought regularization, it would be appropriate if the Application for regularization is considered in accordance with the law either by the Municipal Commissioner or by any other officer as the Commissioner may designate not below the rank of Assistant Commissioner. This exercise shall be completed within a period of 3 months from the date on which an authenticated copy of this order is produced on the record of the Commissioner. In the meantime, no coercive steps shall be taken in respect of the signages forming the subject matter of regularization for the period until 30 November, 2012. In the interest of clarity, the Petitioners shall file a specific representation before the Commissioner of Thane Municipal Corporation within a period of one week from today.

2. *The Petition is accordingly disposed off with no order as to costs."*

(Underlines supplied)

5 On 7th August, 2012, a representation was made by the first petitioner to the first respondent. After hearing the petitioner, an order was passed by an officer of the 1st respondent Municipal Corporation on 20th November, 2012 by which the petitioners were called upon to deposit the advertisement fees and

penalty totally amounting to Rs.46,18,800/-. The said order records that the officer of the first petitioner company stated that the petitioner was ready to pay advertisement fees for a period of two years, but was not ready to pay penalty.

6 The challenge in this petition under Article 226 of the Constitution of India is to the orders dated 19th March, 2012 and 19th July, 2012 as well as the order dated 20th November, 2012 passed on the representation made by the petitioner. We must note here that the challenge to the said order is on the ground that Sections 244 and 245 of the said Act of 1949 are not applicable to the Boards displayed by the petitioners on the shops and the said Boards cannot fall under the category of “Sky signs”. In short, the contention raised in this petition is that for displaying such Boards, a permission of the Municipal Corporation under Section 244 and 245 of the said Act of 1949 read with the Rules of 2003 made thereunder, is not required.

7 While dealing with the preliminary objection raised by the learned counsel appearing for the Municipal Corporation, the learned senior counsel appearing for the petitioners submitted that there is no specific application made by the petitioners for regularisation. He urged that while disposing of the Writ Petition No.7038 of 2012, this Court permitted the petitioners to file a

specific representation which was ordered to be disposed of. He submitted that the representation permitted to be made was not specifically for regularisation and, therefore, the petitioners were entitled to make a representation to the Municipal Corporation by contending that the permission of the Municipal Corporation was not required as Sections 244 and 245 of the said Act of 1949, were not applicable to the Boards in the name of the first petitioner. He submitted that in any event, in the earlier Writ Petition filed by the Petitioners, this Court has not gone into the merits of the notices dated 19th March, 2012 and 19th July, 2012 and the petition was disposed of by merely permitting the petitioners to make a representation. He, therefore, submits that the issue whether Sections 244 and 245 of the said Act of 1949 are applicable to the Boards complained of still remains open which can be always agitated in the present petition under Article 226 of the Constitution of India. He, therefore, urged that submissions on merits will have to be considered.

8 Firstly, we are dealing with the preliminary objections raised by the learned senior counsel appearing for the 1st and 2nd respondents. It will be necessary to make a reference to the averments made in the Writ Petition No.7038 of 2012 and the reliefs sought therein. Prayer Clause (a) is the only prayer which contains substantive relief. Even in the present petition, the

prayer clause (a) is the only prayer which contains substantive relief. The only difference between the prayer clause (a) of the earlier petition and prayer clause (a) of the present petition is that in addition to challenge to the notices dated 19th March, 2012 and 19th July, 2012, now in the present petition, there is a challenge to the order dated 20th November, 2012 passed on the representation made by the petitioners.

9 It is not disputed that the display Boards subject matter of both the petitions are same. The notices dated 19th March, 2012 and 19th July, 2012 allege that the Sky Signs/Boards have been displayed on various shops by the petitioners without obtaining permission of the Municipal Corporation under Sections 244 and 245 of the said Act of 1949. By both the notices, the petitioners were called upon to remove the said Boards. Perusal of the averments made in Writ Petition No.7038 of 2012 show that the challenge to the said two notices was on the same ground which is incorporated in the present petition. The ground is that Sections 244 and 245 of the said Act of 1949 and the Rules of 2003 are not applicable, as the said Boards are not "Sky signs". It will be necessary to refer to paragraph 11 of the Writ Petition No.7038 of 2012.

"11 The Petitioner No.1 by its letter dated 25th

*June, 2012 also called upon the Respondent No.2 to regularize the boards, since the same were allegedly put up without the permission of the Respondents. However, till date the Petitioner No.1 has not received any response from the Respondents. Hereto annexed and marked **EXHIBIT "C"** is a copy of the said letter of the Petitioner, dated 25th June, 2012."*

10 Thus, the specific stand of the petitioner in the said writ petition was that on 25th June, 2012, the first petitioner - company applied to the second respondent for regularisation of the Boards subject matter of the said two impugned notices. The 2nd respondent is the Assistant Commissioner of the Municipal Corporation.

11 In the context of the challenge in the earlier petition and the aforesaid averments in paragraph 11 that the preliminary objection will have to be considered. In first paragraph of order dated 1st August, 2012, the Division Bench has specifically observed that since the petitioners have sought regularisation, it would be appropriate if the application for regularisation is considered in accordance with law by the Municipal Corporation or by any other officer nominated by the Municipal Commissioner. A direction was issued under the said order to deal with the application for regularisation within a period of three months. The

liberty granted to make a specific representation cannot be construed to mean that a liberty was granted to make a representation by contending that a permission under Sections 244 and 245 of the Said Act of 1949 was not required. The liberty was granted specifically in the interest of clarity. Thus, on plain reading of the aforesaid order, the earlier petition was disposed of by a Division Bench of this Court by directing the Municipal Corporation to decide the application for regularisation made by the petitioners. The order begins by noting that an application for regularisation is pending. This Court directed that the said application shall be decided. Thus, the petitioners did not press the challenge in the petition to the notices dated 19th March, 2012 and 19th July, 2012. The order does not reserve any liberty to the petitioners to file a fresh petition to challenge the said notices. Moreover, the order does not note that the application for regularisation was made without prejudice. The said order passed way back on 1st August, 2012 shows that the petitioners did not agitate the challenge to the notices dated 19th March, 2012 and 19th July, 2012 on merits. The petitioners neither challenged order dated 1st August, 2012 nor sought any clarification about the said order till today. Therefore, in Writ Jurisdiction under Article 226 of the Constitution of India, now it is not open for the petitioners to again challenge the same notices dated 19th March, 2012 and 19th July, 2012 by filing a fresh petition.

12 It will be necessary to make a reference to the application dated 25th June, 2012 made by the first petitioner to the Municipal Corporation. A copy of which is annexed as Exhibit-C to both the petitions. The application reads thus:

“Sub - Regularising the glow sign boxes in Thane.

Dear Sir/Madam,

We have around 36 signages in Thane municipal corporation's jurisdiction which has a visibility area of 1241 sq.feet of visibility. Details of the same are attached with the application as annexure.

Kindly let us know the procedure to regularize the same.”

13 The Division Bench has referred to the same application as a representation dated 25th June, 2012 for regularization. Therefore, the Division Bench observed that the petitioners have sought regularization. Therefore, it is not open for the petitioners now to contend that by application dated 25th June, 2012 they never sought regularisation. As stated earlier, liberty granted under order dated 1st August, 2012 was to make an additional representation in the interest of clarity on the prayer of regularisation. However, the liberty granted under the order dated 1st August, 2012 has been misused by the petitioners by

making a representation contending that the provisions of Sections 244 and 245 of the said Act of 1949 are not applicable to the Boards subject matter of the notices impugned in this petition. In fact, the representation made by the petitioners ought not to have been entertained by the Municipal Corporation in the light of the order dated 1st October, 2012. It is pertinent to note that the impugned order dated 20th November, 2012 specifically records the statement of an officer of the first petitioner that the first petitioner was ready to pay advertisement fees for two years. The correctness of the said statement recorded in the said order is not disputed in this Writ Petition in which there is a challenge to the said order. After having pressed the application for regularisation, now the petitioners cannot challenge the said order.

14 A petition under Article 226 of the Constitution of India is always a discretionary remedy. Considering the conduct of the petitioners, apart from the fact that the petitioners have given up their challenge to both the notices, the jurisdiction under Article 226 of the Constitution of India, cannot be exercised, at the instance of the petitioners.

15 The learned senior counsel appearing for the petitioners submitted that there cannot be an estoppel against the

law. The conduct of the petitioners which we have demonstrated by this order is sufficient to throw out the petition under Article 226 of the Constitution of India.

16 Therefore, by upholding the preliminary objections raised by the Municipal Corporation, we decline to entertain this petition and the same is, accordingly, rejected.

17 At this stage, the learned senior counsel appearing for the petitioners prays for continuation of ad-interim relief granted on 3rd December, 2012. The prayer is opposed by the learned senior counsel appearing for the Municipal Corporation. The ad-interim relief granted on 3rd December, 2012 shall continue to operate for a period of six weeks from today.

(A.P. BHANGALE, J.)

(A.S. OKA, J.)