

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST.) NO. 29806 OF 2017

Hotel Swastik	..	Petitioner.
v/s.		
State of Maharashtra & Others	..	Respondents.

Mr. Jayesh Bhatt, for the Petitioner.
Mr. S. H. Kankal, AGP for Respondent-State.

CORAM: M.S.SANKLECHA, J.
DATE : 31st OCTOBER, 2017.

P.C:-

At the request of the parties, the Petition is being taken up for final disposal at the stage of admission.

2 This Petition under Article 227 of the Constitution of India, challenges the order dated 5th October, 2017 passed by the Food Safety Commissioner, Food and Drugs Administration, Mumbai (Respondent No.3.) By the impugned order dated 5th October, 2017 passed under Section 32 (4)(c) of the Food Safety and Standards Act, 2006 (the Act), the Petitioner's license dated 25th July, 2016 (which was valid up to 24th July, 2021), to carry on business as a Restaurant, was cancelled.

3 Briefly, the facts leading to this Petition are that, consequent to the visit of the Food Safety Officer, the Designated Officer (Respondent No.2) passed an order dated 30th June, 2017, suspending the Petitioner's license to carry on business as a restaurant, for a period of 10 days i.e. 24th July, 2017 to 2nd August, 2017. This for having failed to comply with

the required standards of hygiene/ cleanliness in spite notice to improve the deficiencies.

4 Being aggrieved with the order dated 30th June, 2017, the Petitioner had filed an appeal to the Food Safety Commissioner in terms of Section 32 (4) of the Act. In its appeal, it challenged, the suspension of the licence for a period of 10 days. However, the impugned order dated 5th October, 2017 passed in appeal, proceeded to cancel the licence of the Petitioner to conduct the business of restaurant w.e.f. 1st November, 2017.

5 In the above facts, Mr. Bhatt, learned Counsel for the Petitioner submits that the impugned order dated 5th October, 2017, canceling the licence dated 25th July, 2016, is beyond jurisdiction. In an appeal, the appellant cannot be in a worse position then he was in before filing the appeal. This is particularly so in the absence of any power to enhance the penalty/ disqualification in appeal by the appellate authority.

6 On the other hand, Mr. Kankal, learned AGP submits that the impugned order dated 5th October, 2017 is not without jurisdiction as contended by the Petitioner. In support, he is relying upon Section 29(6) of the Act to contend that Commissioner of Food Safety (Respondent No.3) was entitled to pass an order which the Designated Officer (Respondent No.2) could pass under Section 32 of the Act. Therefore, the cancellation of the licence by the impugned order, is not without jurisdiction and no interference is called for more particularly as the issue involves food safety and, consequent health of general public.

7 To appreciate the rival contention, it would be appropriate to re-produce Sections 29 (6) and 32, as under:-

“29:- Authorities responsible for enforcement of Act:-

1 to 5

6 The Commissioner of Food Safety and Designated Officer shall exercise the same powers as are conferred on the Food Safety Officer and follow the same procedure specified in this Act.

32:- Improvement notices:- (1) If the Designated Officer has reasonable ground for believing that any food business operator has failed to comply with any regulations to which this section applies, he may, by a notice served on that food business operator (in this Act referred to as an “improvement notice”)-

- (a) state the grounds for believing that the food business operator has failed to comply with the regulations;
- (b) specify the matters which constitute the food business operator's failure to comply;
- (c) specify the measures which, in the opinion of the said Authority, the food business operator must take, in order to secure compliance; and
- (d) require the food business operator to take those measures, or measures which are at least equivalent to them, within a reasonable period (not being less than fourteen days) as may be specified in the notice.

(2) If the food business operator still fails to comply with an improvement notice, his license may be suspended.

(3) If the food business operator still fails to comply with the improvement notice, the Designated Officer may, after giving the licensee an opportunity to show cause, cancel the license granted to him:

Provided that the Designated Officer may suspend any license forthwith in the interest of public health for reasons to be recorded in writing.

(4) Any person who is aggrieved by-

- (a) an improvement notice; or
- (b) refusal to issue a certificate as to improvement; or
- (c) cancellation or suspension or revocation of license under this Act, may appeal to the Commissioner of Food Safety whose decision thereon, shall be final.

(5) *The period within which such an appeal may be brought shall be-*

- (a) *fifteen days from the date on which notice of the decision was served on the person to appeal; or*
- (b) *in the case of an appeal under sub-section (1), the said period or the period specified in the improvement notice, whichever expires earlier.”*

8 In the present facts, the appeal to the Commissioner of Food Safety (Respondent No.3) is in accordance with Section 32(4) & (5) of the Act. The appeal is from order of Designated Officer (Respondent No.2) passed under Section 32(4)(c) of the Act, suspending the licence. Although, an appeal is normally a continuance of the original proceedings. However, under the Act, the Appellate Authority has not been invested with power to enhance the penalty / disqualification in an appeal filed by the party under Section 32 of the Act as found in case of some other Acts such as Section 251 of the Income Tax Act, 1961. Thus, in the absence of any power in the Appellate Authority to enhance the penalty/ disqualification, the impugned order could not have enhanced a suspension of license to a cancellation of licence in the absence of any statutory power to do so. No such power has been shown to me.

9 The reliance by the State on sub-section 6 of Section 29 of the Act to contend that power to enhance the penalty/ disqualification is misplaced. This is so as it provides that the Commissioner of Food Safety and the Designated Officer are entitled to exercise the same power which are conferred on the Food Safety Officer under the Act. The Commissioner of Food Safety who has passed an impugned order dated 5th October, 2017 is not by virtue of aforesaid provision entitled to act as Designated Officer. A

Designated Officer is different from a Food Safety Officer. It is only the Designated Officer who can canceled and/or suspend the licence under the Act and not the Designated Officer. Section 29(6) of the Act does not empower a Commissioner of Food Safety to act as Designated Officer. Therefore, it is not open to the Commissioner of Food Safety to exercise original jurisdiction of Designated Officer and cancel the licence in an appeal filed against the suspension of licence. It is a settled position as observed by the Privy Court in *Hazi Ahmed v/s. The King Emperor AIR 1936 (PC)253* “where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessary forbidden.”

10 In the above view, the impugned order dated 5th October, 2017 is beyond jurisdiction inasmuch it has canceled the Petitioner's license under the Act while exercising appellate jurisdiction when the original authority namely – Designated Officer had merely suspended the licence. Therefore, the impugned order dated 5th October, 2017 is quashed and set aside. However, the Petitioner's appeal dated 14th July, 2017, being Appeal No.31 of 2017 to the Commissioner Food Safety is restored to him to decide the appeal dealing with the grievance of the Petitioner in its appeal after following the principles of natural justice.

11 In the meantime, till the Food safety Commissioner decides Petitioner's appeal dated 14th July, 2017 being Appeal No.31 of 2017, the order dated 30th June, 2017 passed by the Designated Officer, suspending the license, shall be stayed.

12 It is made clear that merits of the dispute has not been

examined by me and no observations made herein except the observations with regard to the jurisdiction of the Appellate Authority, will influence the Commissioner of Food Safety in disposing of the appeal. This order will also not bar the Respondents from initiating any proceedings for cancellation of the licence, if so warranted. Needless to state, any such proceedings, if initiated, will be adjudicated upon, in accordance with law.

13 **Petition disposed of** in the above terms. No order as to costs.

(M.S.SANKLECHA,J.)