

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2 OF 2017
WITH
CIVIL APPLICATION NO. 4782 OF 2018
CIVIL APPLICATION NO. 4229 OF 2018
CIVIL APPLICATION NO. 5840 OF 2017
CIVIL APPLICATION NO. 10413 OF 2017

Omprakash Kishanlal Mutha

.. **Petitioner**

Versus

The Union of India,
Through the Ministry of Railways,
Through the General Manager and others

.. **Respondents**

Shri R. R. Mantri, Advocat for the Petitioner.
Shri S. B. Deshpande, A.S.G. for Respondent Nos. 1 to 4.

CORAM : **S. V. GANGAPURWALA &**
A. M. DHAVALA, JJ.

Reserved for Orders on : **23rd April, 2018**

Order pronounced on : **8th June, 2018**

ORDER (Per S. V. Gangapurwala, J.) :

1. The present writ petition is filed challenging the notice issued by the respondents. By way of an amendment the petitioner assails the order dated 3.1.2017 passed by the

respondents thereby refusing the explanation of the petitioner and directing removal of the petitioner under Section 147 (2) of the Railways Act, 1989 subject to the decision of the High Court in the instant writ petition.

2. Mr. Mantri, learned counsel for the petitioner submits that the petitioner and earlier his father is doing vending on the platform of Parbhani Railway Station through trolley for past 43 years. The petitioner is also examined by the Central Divisional Medical Officer of Railway Divisional Hospital, Nanded. The petitioner is doing of business of vendor. He has been allotted Batch No. 2, Trolley No. 29. The respondent without any notice on 28.2.2015 tried to seize the trolleys of the petitioner and prohibited the vendors from doing the business. The said action was challenged before this court in Writ Petition No. 3602 of 2015 and 3885 of 2016 by the Union and the petitioner. This court quashed and set aside the impugned action and order of the respondents under its order dated 30th August, 2016. It is also directed that the application of the petitioners therein for renewal / grant of licences shall be considered in accordance with

law. According to the learned counsel, the applications were moved from time to time to the Divisional Commercial Manager, Nanded with a request to grant licences. The applications are still pending. Though the applications were pending the respondent on 11.11.2016 issued fresh notice without any details. Thereafter, the respondents under order dated 15.11.2016 passed Eviction Order under the provisions of the Public Premises (Eviction of Un-authorised Occupants) Act, 1971 to remove trolleys of the petitioner. The petitioner again approached this court by filing Writ Petition No. 11527 of 2016 challenging the said order. During the pendency of the writ petition the respondents un-conditionally withdrew the Eviction Order. Since the Eviction Order was withdrawn, the writ petition is disposed of. However, on 26.12.2016 again respondent no. 2 issued fresh notice to the petitioner alleging tress-pass on platforms. The notice states that the petitioner has not obtained required licence and has continued unauthorised activity and the petitioner was issued show cause notice as to why he shall not be removed by invoking provisions of Section 147 (2) of the Railways Act, 1989. The petitioner replied the Show Cause notice. During

the pendency of the writ petition the Eviction Order is passed.

3. The learned counsel submits that, once action was initiated under the provisions of the Public Premises (Eviction of Un-authorised Occupants) Act, 1971 it was not permissible for the respondent to resort to the provisions of Section 147 of the Railways Act, 1989. The same would be against the doctrine of election. Two remedies cannot be availed. The respondent has already taken action initially under the Public Premises (Eviction of Un-authorised Occupants) Act, 1971, as such could not have resorted to the provisions of the Railways Act, 1989. The learned counsel further submits that, the application of the petitioner for grant of licence is pending. The petitioner submits that unless the provisions of Sub Section 1 of Section 147 are used and the order of conviction is passed, provisions of Sub Section 2 would be inoperative. According to the learned counsel, for more than 43 years since the days of his father, the petitioner is doing his business of vending on the platform through trolley. It cannot be said that the petitioner is unauthorisedly doing the work so as to invoke Section 147 of the Railways Act, 1989. The

learned counsel submits that there is no allotment of any Food Plaza, Food Court at Parbhani Railway Station. Four trolleys are being run on Parbhani Railway Station, none of them have been noticed nor any action has been taken against them. The petitioner is being discriminated. The learned counsel further submits that the impugned order is passed under Catering Policy 2010. Clause 5 of the Policy provides for Catering Stalls of various types including *Kumchas*. Clause 19 and 31 defines minor unit and trolley is a minor unit. The trolleys as such are not prohibited. Even as per Catering Policy 2017 more particularly Clause 10 provides for reservations and Jain caste is entered in minority. The petitioner belongs to Jain caste. Under Clause 3.5 of the policy Side Vending is permitted. Under Clause 9.1 grant of trolley licence is permitted. However, this catering policy fails to protect livelihood of existing petitioner. The procedure of allotment of same by tender at Parbhani Railway Station under Clause 9.3.1 and 2 is against Article 21 of the Constitution of India. The Catering Policy 2010 and 2017 is an attempt to concentrate the entire food business of railways only to few influential person and vending person like petitioner

cannot be deprived of his life and livelihood arbitrarily. The learned counsel to buttress his submission relies on the judgment of the Apex Court in a case of **Senior Divisional Commercial Manager and others Vs. S.C.R. Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association and another** reported in **2016 (3) SCC 582**, wherein judgment of the High Court directing respondents to renew the licences of the petitioners therein under Catering Policy 2010 was upheld. The learned counsel also relies on the judgment of the Apex Court in a case of **Power Machines India Limited Vs. State of Madhya Pradesh and others passed in Civil Appeal No. 5317 of 2017 (Arising out of S.L.P. (C) No. 29266 of 2016) dated 17th April, 2017** to contend that once a remedy is opted under one statute then the remedy under another statute could not have been resorted to. According to the learned counsel, the impugned order is manifestly illegal and deserved to be quashed and set aside.

4. Mr. Deshpande, learned Assistant Solicitor General for respondents submit that, the petitioner is evicted from the railway platform being encroacher. The railway platforms are

basically used by the passengers for boarding and de-boarding from trains. Therefore, every possible effort is to be made to see that there will be no difficulty or hurdle for any passengers in boarding or de-boarding. The passengers also carry luggages, therefore, the railway authorities have thought of restricting plying of trolleys on the platform which creates hurdle in smooth movement of the passengers. The respondents are aware of the needs of the passengers for food, water etc. Therefore, adequate provisions are made on each and every railway station to cater to the needs of passengers. Emphasis is given on static catering unit. As per the catering policy, after following due procedure licensee is appointed. The licensee is responsible for catering needs of the passengers. Considering the length of the platforms adequate provisions of catering unit at both ends is also made. In addition, many trains also have Pantry Cars. In view of these facts, bringing of trolleys on railway platform are restricted and regulated. According to the learned A.S.G., in view of security concern also it is necessary that persons having lawful authority enter the railway platform. The vendors must obtain licence from the competent authority. The petitioner is an encroacher.

He does not have any licence. In view of that, action under Section 147 of the Railways Act, 1989 has been rightly taken. The Batch produced by the petitioner appears to have been issued to the petitioner by the Union and not by the Railways. The presence of unauthorised traders is cause of concern for the passengers and the authorities. The authorities have to decide how many catering units should be on the platform. The respondents have never received any complaint of inconvenience from the passengers due to lack of alleged catering units. The right to do business is subject to reasonable restrictions as per law and policy. The petitioner being ranked encroacher cannot take umbrage of right of livelihood. The learned counsel submits that, at Parbhani Railway Station on Platform No. 1 one Mr. Akhilesh Singh is a tea stall contractor and on Platform Nos. 2 and 3 Smt. Sanjana Kumari Meena is the licensee of the tea stall. This would demonstrate that facility of catering is available at Parbhani Railway Station. The learned A.S.G. relies on the Judgment of the Apex Court in a case of **Collector District Gwalior and another Vs. Cine Exhibitors Private Limited and another** reported in **(2012) 4 Supreme Court**

Cases 441 and submits that if under wrong provision any action was taken the same would not preclude the respondents from resorting to an action under appropriate statute. The petitioner does not get any right only because initially order was passed under the Public Premises (Eviction of Un-authorised Occupants) Act, 1971. The learned A.S.G. also relies on the Judgment of the learned Single Judge of the Calcutta High Court in a case of **Dhurjati Prosad Das Vs. Union of India** reported in **2013 (5) CHN (CAL) 93** and submits that Section 147 of the Railways Act, 1989 can be applied when a person enters upon any railway property without lawful authority. He also relies on another Judgment of the learned Single Judge of the Calcutta High Court in a case of **Pabitra Kumar Dutta and others Vs. General Manager, Eastern Railway and others** reported in **AIR 2006 Cal 157**.

5. The petitioner during the pendency of the writ petition had amended the petition by assailing the order passed by the respondent during pendency of the writ petition thereby directing removal of the petitioner. Subsequently, Civil

Application No. 4782 of 2018 is also filed thereto bringing on record the Catering Policy 2017 and pleading some averments with regard to the said policy and sought leave to amend the writ petition by adding paras 1 to 4 of the said civil application. However, in the said civil application also no amendment was sought with regard to the prayer clause for challenging the Catering Policy 2017. We have also considered the arguments canvassed by the learned counsel as pleaded in Civil Application 4782 of 2018.

6. Upon consideration of the pleadings it appears that the petitioner was vending eatables through trolleys on the Parbhani Railway Station platform. The petitioner has produced the identity card issued by the Railway Canteen Vendor (Vikreta) Union. However, there does not appear to be a licence issued by the railway authorities to the petitioner to vend at the Parbhani Railway Station through trolley. Notices are issued to the petitioner and others since the year 2015 directing removal of the trolleys of the petitioner on the ground that they are unauthorisedly occupying space on the platform of Parbhani

Railway Station.

7. In the present case, we do not find any licence being produced by the petitioner duly issued by the railway authorities. For a person to lawfully do business of vending at the railway platform a valid licence from the railway authorities would be a pre-condition. Though, the documents on record suggest that the petitioner was doing business of vending through trolleys on the Parbhani Railway Station platform. However, there does not appear any identity card or licence being issued by the railway authorities in favour of the petitioner. In absence of any licence being issued in favour of the petitioner it cannot be said that the petitioner is lawfully doing the business at the railway platform and as such would not get the vested right to carry on the business at the railway platform. The parties would certainly be bound by the catering policy being effectuated from time to time. Of course, the vested right in favour of party cannot be divested. As observed above, we do not find any identity card or the licence being issued by the railway authorities in favour of the petitioner. In absence thereto, we cannot fathom the argument

of the petitioner that he is legitimately carrying on the business of vending through trolleys on the Parbhani railway platform.

8. No doubt, right to life and livelihood is a fundamental right guaranteed under Article 21 of the Constitution of India. However, the said right would apply to a person who is legally carrying out the business. Unless and until the petitioner could show that he is legitimately carrying on his business he would not be entitled for the protection of this court. The respondent has produced the various identity card issued by the respondent in favour of various persons for catering unit of tea stall at Parbhani Railway Station but the petitioner has not been issued with any vending permit or identity card by the railway authorities. The railway authorities certainly are empowered to enact the policy for better management of the railway platforms. We could have appreciated the contention of the petitioner that the source of livelihood being a part of right to life has to be protected, if, the petitioner would have been in a position to show that he had a legal right subsisting in him to carry on his business at the railway platform. In absence of any licence or

the vending permit issued by the respondent the petitioner cannot be heard to say that he has a right to carry on the business at the railway platform and the act of respondent would tantamount to deprivation of his right to freedom of occupation and right to livelihood. In view of that, the Judgment of the Apex Court in a case of **Senior Divisional Commercial Manager and others Vs. S.C.R. Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association and another** (*Supra*) would not inure to the benefit of the petitioner.

9. The contention of the petitioner that unless Sub Section 1 of Section 147 of the Railways Act, 1989 is invoked Sub Section 2 of Section 147 of the Railways Act, 1989 cannot be invoked does not stand to any reason. Section 147 (2) of the Railways Act, 1989 cannot be said to be dependent upon Section 147 (1) of the Railways Act, 1989. Section 147(2) the Railways Act, 1989 is self operative and a person who does not have a right under the statute to carry on the business is a trespasser. If a person enters upon any part of the railway without lawful authority he can be removed by invoking Sub Section 2 of Section 147 of the

Railways Act, 1989. In absence of any licence being issued in favour of the petitioner by the respondent the petitioner did not have a lawful authority to do his business of vending by trolley, as such, he can be removed under Sub Section 2 of Section 147 of the Railways Act, 1989.

10. As the petitioner does not have a right to enter upon the railway premises and do the business of vending on trolleys the petitioner does not have right to assail the catering policy.

11. The contention of the petitioner that the respondents have earlier invoked provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and as such now cannot resort to the provisions of Section 147 of the Railways Act, 1989 is erroneous. If a particular proceedings are undertaken under the wrong provisions or a statute the same would not operate as an estoppel. The respondents having found that the petitioner is carrying on the business of vending through trolleys on the railway platform without any licence or permit naturally had the right to invoke Section 147 of the Railways Act, 1989. The

earlier order of eviction under the Public Premises (Eviction of Un-authorised Occupants) Act, 1971 which is subsequently withdrawn would not be an impediment for the respondents to initiate proceedings under the Railways Act. The proceeding is independent.

12. In light of the above, no case for interference is made out.

13. The petitioner has averred that the petitioner has applied for licence and the application is pending. In case such an application is pending and the same is not yet decided, then the respondents - authorities shall decide the same on its own merits, in accordance with law, expeditiously and preferably within six (6) weeks.

14. Writ Petition accordingly is dismissed. No costs.

15. In view of dismissal of writ petition, civil applications also stand disposed of.

16. At this stage, learned counsel for the petitioner seeks continuation of interim orders passed by this court during the pendency of the writ petition. Learned A.S.G. for respondents opposes the said request.

17. Considering the fact that interim orders were in operation during the pendency of writ petition, interim orders passed by this court are continued for a period of six (6) six weeks from today. Needless to state, on lapse of six (6) weeks interim orders shall come to an end.

[A. M. DHAVAL, J.]

[S. V. GANGAPURWALA, J.]

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