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

WRIT PETITION NO. 518 OF 2017

Mohd. Sayed Mohd. Salim Nagori Rizvi ...Petitioner
Age 30 Yrs., Indian Inhabitant, R/at. Friends
Apartment, 36 Bazar Road, near Temple
Bandra (W), Mumbai – 400 050.

Versus

1. The Municipal Commissioner & Ors. ...Respondents

Ms. Aditii Naikare, I/b Mr. Pradeep J. Thorat, for Petitioner.
Ms. Shital Mane, for Respondent – BMC.

CORAM: **A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON **14TH AUGUST, 2018**

JUDGMENT PRONOUNCED ON **17TH SEPTEMBER, 2018**

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. The Petitioner by the present Petition is seeking a direction against the Respondents to reconstruct the stall / shop occupied by the Petitioner which is alleged to have been illegally demolished by the Respondents on 16th December, 2016 without following the due process of law or in the alternative a direction to the Respondents to provide suitable alternate premises of equivalent area as that of the said premises and in the nearby vicinity of the said premises which have been illegally demolished by the Respondents. Further, relief has been sought by way of

amendment to the Petition for quashing and setting aside order dated 11th December, 2017 passed by the Assistant Municipal Commissioner, H – West Ward, Mumbai Municipal Corporation which upholds the impugned action of demolition as well as a challenge to clause (v) of the Circular dated 5th October, 2015 to the extent that it holds that the license issued under Section 394 of the Mumbai Municipal Corporation Act, 1888 (for short “the said Act”) will not be considered to treat the structure as authorised.

2. The Petitioner claims to be suffering from 100% hearing disability. The stall / shop admeasuring 9.24 sq. mtrs situate at Abdul House, John Baptista Road, Iraniwadi, Bandra (West), Mumbai 400 040 is the subject matter of the present Petition (for short “the subject premises”). The Petitioner has stated that the subject premises was originally situate on the private land CTS No. B/639 owned by Aaron Daniel Abraham and others. The Petitioner's predecessor one Shri Ankush Salgaonkar was carrying on business from the subject premises prior to 1986. Respondent No.1 – Corporation acquired a portion of the land CTS No. B/639 for the purpose of road widening due to which the size of the subject premises was required to be reduced by the predecessor. Respondent No.1 – Corporation permitted the Petitioner's predecessor to construct the subject premises

admeasuring 4.20 meter X 2.20 meter. A request was made by the Petitioner's predecessor to increase the size of the subject premises and pursuant to the request, Respondent No.2 issued letter dated 20th June, 2011 granting permission to increase the size to the original size of 6 X 4 sq. mtrs. Respondent No.2 further permitted the said Shri Ankush Salgaonkar to carry out repairs of the subject premises on terms and conditions mentioned therein. The Petitioner purchased the subject premises from the previous owner, the said Shri Ankush Salgaonkar under Agreement for Sale dated 30th June, 2012 for valuable consideration. It is stated in the Petition that the Petitioner's predecessor who was carrying on business in the subject premises in the name and style of M/s. Lalita Stores was paying necessary fees and ground rent in respect of the subject premises to the Respondent – Corporation and was issued a Registration Certificate in respect of his establishment under the Bombay Shops and Establishments Act, 1948. Respondent No.3 had also issued license under Section 394 of the said Act in respect of business carried out by the predecessor of the Petitioner from the subject premises.

3. An application was submitted to the Respondent No.1 – Corporation for transfer of the subject premises in his name. The Assistant Engineer (Maintenance), H/W Ward of the Respondent

No.1 – Corporation issued letter dated 9th August, 2014 transferring the subject premises in favour of the Petitioner on terms and conditions mentioned in the said letter. The Petitioner appears to have also been directed by the Respondent No.1 – Corporation to pay transfer charges amounting to Rs.50,000/- and 10 years ground rent amounting to Rs. 7,200/- within seven days for effecting transfer of the subject premises in favour of the Petitioner. In pursuance of order dated 6th August, 2014 passed by the Deputy Municipal Commissioner, Zone III, the Petitioner paid transfer charges of Rs.50,000/- and 10 years ground rent amounting to Rs.7,200/- to the Respondent No.1 – Corporation. The Petitioner's name was accordingly included in the Ground Rent Register in place of his predecessor, Shri Ankush Salgaonkar. The Petitioner started business in the name and style of M/s. Siddhivinayak Fast Food from the subject premises and was issued Registration Certificate by Respondent No.1 – Corporation for his establishment under the Maharashtra Shops and Establishments Act, 1948. A Trade License was also issued by Respondent No.3 under Section 394 of the said Act in respect of the business of the Petitioner's Fast Food Centre and Chat carried out from the subject premises. The Petitioner further obtained Registration Certificate under the Food Safety and

Standards Act, 2006 in respect of the business of M/s. Siddhivinayak Fast Food carried out from the subject premises. A police license has also been obtained and electricity connection from Reliance Energy for conducting the business from the subject premises.

4. The Petitioner has stated in the Petition that in the month of September, 2016 the officials of the Respondent No.1 – Corporation visited the subject premises and informed the Petitioner that the subject premises is unauthorised and same will be demolished as soon as necessary police protection is obtained. The Petitioner accordingly filed Long Cause Suit No. 2449 of 2016 before the City Civil Court at Dindoshi against the Respondents seeking an order of injunction restraining the Respondents from disturbing the possession of the Petitioner over the subject premises or demolishing the subject premises without following due process of law. An order dated 21st September, 2016 was passed by the learned Judge of the City Civil Court at Dindoshi by which ad-interim relief was granted to the Petitioner and the Respondent No.1 – Corporation was restrained from demolishing the subject premises without following due process of law. Thereafter, the Respondent No.3 issued Notice dated 15th December, 2016 to the Petitioner stating that the trade activity is

not permitted on the footpath without license under Section 313 of the said Act. It further stated that the subject premises is situated on Municipal footpath and hence ground rent is cancelled. Consequently license under Section 394 of the said Act is also cancelled. The Respondent No.3 directed the Petitioner to discontinue trade activity from the subject premises with immediate effect. On the very next day i.e. 16th December, 2016, the officers of the Respondent No.1 – Corporation visited the subject premises and demolished the same. This according to the Petitioner was done without following due process of law and despite an order of injunction having been passed by the City Civil Court at Dindoshi restraining Respondent No.1 – Corporation from demolishing the subject premises. The Petitioner filed a complaint dated 16th December, 2016 against the Respondents with the Inspector of Police, Bandra Police Station. The Petitioner has thereafter filed the present Petition.

5. An order dated 20th November, 2017 came to be passed by this Court wherein a statement was made by the learned counsel for the Respondent No.1 – Corporation on instructions that the case of the Petitioner would be reconsidered by the Respondent No.1 – Corporation and decision would be rendered within 10 days. The statement was accordingly accepted. An order dated

11th December, 2017 came to be passed by the Respondent No.1- Corporation wherein it was held that as the subject premises was on the footpath and there was no license under Section 313 of the said Act, the same shall be treated as unauthorised encroachment on footpath and hence no compensation shall be awarded to the Petitioner against demolition of the subject premises on the footpath. The Petitioner being aggrieved by the impugned order dated 11th December, 2017 as well as the reliance upon the Respondent No.1 – Corporation on the said Circular dated 5th October, 2015 has amended the Petition. This Court by order dated 10th January, 2008 issued notice to the parties that considering the nature of the issue involved in this Petition, this Petition needs to be disposed of finally at the stage of admission. Accordingly, this Petition is taken up for final disposal.

6. The learned counsel appearing for the Petitioner submits that the subject premises was demolished by the Respondent No.1 – Corporation without following due process of law. He submits that the Notice issued by the Respondent No.1- Corporation on 15th December, 2016 cancelled the ground rent of the subject premises as well as the health license issued to the Petitioner with immediate effect. On the very next day of the issue

of the Notice dated 15th December, 2016, the Respondent No.1 – Corporation demolished the subject premises without granting the Petitioner an opportunity of hearing and in violation of the principles of natural justice. He has submitted that the subject premises of the Petitioner is an authorised structure having been issued all the requisite permissions including necessary health license by the Respondent No.1 – Corporation and license under the Maharashtra Shops and Establishments Act, 1948 for carrying out business from the subject premises. Further, the Petitioner has paid the transfer charges and 10 years ground rent as directed by the Respondent No.1 – Corporation. He submits that the Petitioner is a disabled person and the business carried out by the subject premises was his only source of livelihood. He has submitted that the demolition of the subject premises was also in breach of order of injunction dated 21st September, 2016 passed by the learned Judge of the City Civil Court at Dindoshi. He has submitted that having been issued the requisite licenses, the Respondent No.1 – Corporation could not demolish the subject premises only on the premise that the license under Section 313 of the said Act appears to have not been issued. He submits that the Respondent No.1 – Corporation has justified the demolition of the subject premises by erroneously placing reliance on the

impugned circular dated 5th October, 2015 and in particular clause (v) thereof in its impugned order dated 11th December, 2017. He submits that Respondent No.1 – Corporation cannot ignore the payments of transfer charges, ground rent made by the Petitioner as well as health license and Shops and Establishments license issued to the Petitioner for carrying out the business from the subject premises. He has submitted that the subject premises is not obstructing the pedestrian and vehicular traffic and / or is situated on Municipal road. He has submitted that the impugned action of the Respondents of demolition of the subject premises without notice and / or hearing is contrary to the well settled law laid down by the Supreme Court as well as this Court. He has relied upon a judgment of this Court in ***Navinchandra Shyamji Chhadva & Ors. Vs. State of Maharashtra & Ors***¹, wherein this bench had on the facts of the case held that the act of issuing notice under Section 314 of the said Act cannot be said to amount to following due process of law. He has submitted that the subject premises having been demolished without following due process of law in the present case ought to be reconstructed and / or suitable alternate premises ought to be made available to the Petitioner of an equivalent area as that of the subject premises in

¹ Writ Petition No. 454 of 2016 decided on 1st March, 2018.

nearby vicinity so that the Petitioner may be able to carry out his business.

7. The learned counsel appearing for the Respondent – Corporation has supported the impugned action of the Respondents. He has submitted that the action of demolition of the subject premises has been taken under Section 314 of the said Act as the subject premises was on a Municipal footpath and hence under the said provision the Commissioner of the Respondent No.1 – Corporation can remove the subject premises without issuance of notice. He has submitted that the subject premises was required to be removed in view of the Circular of the Respondent No.1 – Corporation dated 15th October, 2015. He has placed reliance upon clause (v) of the impugned Circular and submitted that only when the subject premises has valid license under Section 313 of the said Act, the premises shall be treated as authorised. He has submitted that the Respondents have by following due process of law demolished the subject premises as per the provisions of Section 314 of the said Act by giving sufficient time to the Petitioner to remove his belongings or articles on 16th December, 2016. He has submitted that the Respondent No.1 – Corporation agreed to reconsider the decision regarding removal of the subject premises and had granted a hearing to the

Petitioner and reconsidered all his documents. He submits that after hearing the Petitioner, the Respondent No.1 – Corporation passed order on 11th December, 2017 upholding the action of demolition of the subject premises by placing reliance upon the Circular dated 5th October, 2015 and the fact that no license under Section 313 of the said Act had been issued for the subject premises and / or the subject premises was not originally allotted to any disabled / physically challenged person. He has placed reliance upon the Affidavit of Shri Sharad Ughade, Assistant Commissioner, H/W Ward of the Respondent No.1 – Corporation in support of his submission. The deponent of the said Affidavit has relied upon similar Petitions filed by the other Petitioners in this Court where this Court has observed that the Commissioner has power to remove without notice anything erected, deposited or hawked in contravention of Sections 312, 313 and 313A of the said Act and such discretion vested in the Commissioner and action was justified in that case viz. Writ Petition (L) No. 45 of 2016 as the premises was blocking a Nallah and hence was demolished.

8. We have considered the submissions. The Petitioner is aggrieved by the demolition of his subject premises carried out by the Respondent No.1 – Corporation under Section 314 of the said

Act on 16th December, 2016 without any Notice and / or hearing. It appears that one day prior to the demolition of the subject premises, the Respondent No.1 – Corporation issued letter / notice to the Petitioner cancelling the health license and the ground rent of the subject premises. The Respondent No.1 – Corporation proceeds on the premise that the Petitioner did not possess a license under Section 313 of the said Act and that under its Circular dated 5th October, 2015 only those stalls / shops shall be treated as authorised where they are having a license under Section 313 of the said Act. The Respondents claim that they are entitled under Section 314 of the said Act to demolish the said structure without any notice as the subject premises was on a Municipal footpath and without having a licence under Section 313 of the said Act. The subsequent order issued by Respondent No.1 – Corporation on 11th December, 2017 upon agreeing to reconsider the case of the Petitioner as recorded by order of this Court dated 20th November, 2017, also proceeds on the premise that the unauthorised encroachment was on a footpath and as no license had been granted under Section 313 of the said Act, the premises was demolished.

9. It would in this context be relevant to consider the scope and ambit of Section 314 of the said Act which reads thus:-

Section 314

[Power to remove without notice anything erected, deposited or hawked in contravention of section 312, 313 or 313A.] [1]

(a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section (1) of section 312, after the same comes into force [2] [in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 [3] [or in the extended suburbs after the date of the coming into force of the Bombay Municipal (Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956];]

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached, or suspended in, upon, from or to any place in contravention of sub-section (1) of section 313;

(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of section 313A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale.]

(d) any person, unauthorisedly occupying or wrongfully in possession of any public land, from such land together with all the things and material unauthorisedly placed, projected or deposited on such land by such person:

Provided that, the Commissioner shall, while executing such removal, allow such person to take away his personal belongings and household articles, such as cooking vessels, bed and beddings of the family, etc.]

10. The constitutional validity of Section 314 of the said Act came up for challenge before the Supreme Court in the case of ***Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors.***² The Supreme Court in paragraphs 44 and 45 held thus:-

² (1985) 3 Supreme Court Cases 545

44. *The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by Section 314 of that Act, which provides by clause (a) that the Commissioner may, without notice, take steps for the removal of encroachments in or upon any street, channel, drains, etc. By reason of Section 3(w), 'street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by Section 314 is fair and reasonable, we must first determine the true meaning of that section because, the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting, it differently, Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercise in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading Section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.*

45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules or natural justice by reason or diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

11. The Supreme Court thus held Section 314 to be in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner in appropriate cases, to dispense with the previous notice to persons who are likely to be affected by the proposed action. However, this cannot be to read to mean that in total disregard of relevant circumstances, pertaining to a given situation, the Commissioner must cause the removal of encroachment without issuing previous notice. The discretion exercised by the Commissioner under Section 314 of the said Act

is to be exercised in a reasonable manner so as to to comply with the constitutional mandate that the procedure accompanying the purpose of a public act must be fair and reasonable. The Supreme Court accordingly upheld the constitutional validity of Section 314 of the said Act. This decision of the Supreme Court has been consistently followed by this Court. Two of the decisions of this Court are worth mentioning in the context of the present case. In ***Savitri Laxman Suvare and 7 Ors. Vs. The Union of India and 4 Ors.***³, the Division Bench of this Court has referred to the judgment of the Supreme Court in ***Olga Tellis (Supra)*** and has observed that the Supreme Court in that case had held that a minimal notice and hearing is not ruled out in all cases and for all times under Section 314. This Court has observed that a general rule was not laid down in the judgment of the Supreme Court that in every case which is of emergent nature, the Corporation is obliged to follow the principles of natural justice. The Corporation would have to justify that there was an urgency. That there was indeed a requirement of expeditious removal without notice of certain structures as they were affecting public streets, pavements, footpaths or other similar conveniences. The record would have to be produced for the Court to be satisfied with

3 2016 SCC Online Bom 1502.

regard to the dispensation of a notice and hearing by the Corporation. This Court in so observing held that, beyond these observations nothing else can be read into this judgment. This has been observed in paragraph 18 of the said decision which reads thus:-

“18. Once the only reliance that is placed is on the scheme at page 145 and that is found to be wholly inapplicable, then we do not see how assistance can be derived from the judgment of the Hon’ble Supreme Court of India in Olga Tellis . In that case, the Hon’ble Supreme Court of India was considering a challenge to the constitutional validity of Section 314 of the Mumbai Municipal Corporation Act, 1888. In Mr. Sabban’s submission, those residing on pavements and footpaths were evicted as a part of the block or mass demolition drive. They were thrown out of their hutments and hut-like structures or from the pavements without any prior notice, leave alone a hearing. Reliance was placed by Municipal Corporation on Section 314, which empowers and authorizes it to remove all obstructions and obstacles on public streets, pavements and footpaths. In considering that challenge, the Hon’ble Supreme Court held that a minimal notice and hearing is not ruled out in all cases and for all times under Section 314. The Section could be saved by reading into it a requirement of this nature, depending upon the facts and circumstances of each case. No general rule was laid down that in every such case which is of emergent nature as well, the Corporation is obliged to follow the principles of natural justice. On the other hand, if the action was challenged in Court, the Corporation would have to justify that there was an urgency, that there was indeed a requirement of expeditious removal without notice of certain structures as they were affecting public streets, pavements, footpaths or other similar conveniences. The record would have to be produced for the Court to be satisfied with regard to the dispensation of a notice and hearing by the Corporation.

Beyond this, we do not read anything in this judgment. Rather it holds that there is no fundamental or vested right in squatting or encroaching on public lands and properties. There is no license to enter upon such lands unauthorisedly, or to remain there merely because the occupation is of decades together. Neither is there any obligation of the State or the other authorities to provide such persons who are affected or removed an alternate site or accommodation. It was because the plight of these pavement dwellers and those on the footpaths being there for decades together moved the Supreme Court that the eventual directions on which Mr. Sabban relies were issued”.

12. Another decision of this Court worth referring to in this context is in **Javed Khalid Khan Vs. Thane Municipal Corporation & Ors.**⁴. The Division Bench of this Court disposed of a group of Writ Petitions by a common judgment. These Petitions challenged the action taken by Respondent No.1 – Corporation of demolition of the shops under Section 231 of the Maharashtra Municipal Corporations Act, 1949. Section 314 is almost identical to Section 231 of the MMC Act, 1949 and hence this judgment is relevant in the facts of the present case. The Division Bench of this Court comprising one of us (A.S.Oka.J.) in paragraphs 20 to 22 held thus:-

20. We have carefully considered the submissions. There is no dispute between the parties that the shop premises/structures subject matter of these petitions were in existence and were demolished by the said Corporation. As far as the demolition of illegal structures

4 Writ Petition No. 7856 of 2016 decided on 21st June, 2018.

is concerned, the law has been laid down by the Division Bench of this Court in the case of Sopan Maruti Thopate and others (supra). Paragraphs 19 to 21 of the said decision read thus:

“19. Hence, on the basis of the law as discussed above, it is directed that after 1st May, 1996 the Bombay Municipal Corporation or the Municipal Corporations constituted under the B.P.M.C. Act would follow the following procedure before taking action under Section 351 of the B.M.C. Act or under S.260 of the B.P.M.C. Act.

“(i) In every case where a notice under Section 351 of the B.M.C. Act/ under Sec. 260 of B.P.M.C. Act is issued to a party 15 days' time shall be given for submitting the reply. In case the party to whom notice is issued sends the reply with the documents, and shows cause, the Municipal Commissioner or Deputy Municipal Commissioner shall consider the reply and if no sufficient cause is shown, give short reasons for not accepting the contention of the affected party.

(ii) It would be open to the Commissioner to demolish the offending structure 15 days after the order of the Commissioner/ Deputy Municipal Commissioner is communicated to the affected person.

(iii) In case the staff of the Corporation detects the building which is in the process of being constructed and/or reconstructed and/ or extended without valid permission from the Corporation, it would be open to the Commissioner to demolish the same by giving a short notice of 24 hours after drawing a panchanama at the site and also by taking photographs of such structure and/or extension. The photographs should indicate the date when the same were taken.

(iv) In case where the Municipal Corporation has followed due process of law and demolished the unauthorised structure and or extension, if the same is reconstructed without valid permission within a period of one year, it would also be open to the Corporation to demolish the same by giving a short notice of 24 hours.

(v) If the offending structure and/or extension which is assessed by the Corporation for two years, notice shall

provide for 15 days' time to show cause. If the Deputy Municipal Commissioner comes to the conclusion that he requires assistance of the party, he may give an oral hearing if he deems fit and proper before passing the order. It is made clear that oral hearing is not at all compulsory but it is at the discretion of the authority.

(vi) In any other case the Corporation is directed to issue a show cause notice in case of any structure and/or extension other than those mentioned in clauses (i) to (iv) above. The Corporation shall provide for 7 days' time to show cause in such a case."

20. In case the notice is issued under Sec. 478 of the B.P.M.C. Act, 1949 and if the person has not complied with the requisitions of the Commissioner, then it would be open to the Commissioner to demolish the unauthorised structure after expiry of 30 days of the period specified in the notice for removal of such construction.

21. The Municipal Corporations in the State of Maharashtra would follow the above directions so as to avoid unnecessary litigation."

(emphasis added)

21 The said decision of the Division Bench of this Court has admittedly attained finality. It deals with section 260 of the said Act of 1949 as is clear from paragraph 19 of the said Judgment in which the said Act of 1949 is referred as B.P.M.C Act. It is an admitted position that in none of the cases in hand, the aforesaid directions issued by the Division Bench were followed. In few cases, where notices were issued on 26th/30th April 2016 under section 260 of the said Act of 1949, admittedly 15 days time was not granted to the petitioner to submit a reply to the notice. Admittedly, much before the completion of the period of 15 days from the date of service of notices, the structures were demolished.

22 A vague contention has been raised in some of the petitions by the said Corporation that in view of section 231 of the said Act of 1949, it was not necessary to serve a notice to the petitioners. We must note here

that it is not the case of the said Corporation that principles of natural justice have been followed before taking action of demolition. These issues were considered by the Division Bench of this Court of which one of us (A.S.Oka,J.) was a party by the aforesaid Judgment dated 31st July 2015. Paragraphs 7 to 10 of the said decision read thus:

“7. The law on the aspect is no more res integra starting from the decision of the Apex Court in the case of Olga Tellis and others v. Bombay Municipal Corporation and others. **The Apex Court held that before taking action of removal of encroachment on the streets or footpaths, the rule of audi alteram partem has to be complied with.**

8. In the present case, admittedly, no opportunity whatsoever of being heard was granted to the Petitioner in any form before taking action of demolition and no notice was served to the Petitioner before taking action of demolition.

9. **In the affidavit in reply, reliance is placed on Section 231 of the said Act by contending that it was not necessary to issue any notice for removing encroachments on the public road. Section 231 of the said Act reads thus:**

231. The Commissioner may, without notice, remove anything erected, deposited or hawked or exposed for sale in contravention of Act. The Commissioner may, without notice, cause to be removed,—

(a) any wall, fence, rail, post, step, booth or other structure whether fixed or movable and whether of a permanent or a temporary nature, or any fixture which shall be created or set up in or upon or over any street or upon or over any open channel, drain, well or tank contrary to the provisions of this Act after the appointed day ;

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached or suspended in, upon from or to any place in contravention of this Act ;

(c) any article whatsoever hawked or exposed for

sale in a public place or in any public street in contravention of the provisions of this Act and any vehicle, package, box or any other thing in or on which such article is placed. ”

10. It is contended that as the shop structure was on the road, Section 231 of the said Act will apply. **Along with the affidavit in reply, no material whatsoever has been placed on record by the first Respondent showing that the shop structure subject matter of this Petition was constructed on a public street, open channel, drain, tank or well. Hence, Section 231 of the said Act has no application.”**

13. The decision of this Court in ***Javed Khalid (Supra)*** has gone on to hold that for the demolition of illegal structures, the law laid down by the Division Bench of this Court in the case of ***Sopan Maruti Thopte and Anr. Vs. Pune Municipal Corporation***⁵ has to be followed. This Court negated the submission of the Corporation that in lieu of Section 231 of the Act of 1949, it was not necessary to serve a notice to the Petitioners. The Division Bench of this Court held that the principles of natural justice are required to be followed and has relied upon its earlier decision dated 31st July, 2015, where the rule of *audi alteram partem* has to be complied with before removal of encroachments on streets or footpaths following the judgment of the Supreme Court in ***Olga Tellis (Supra)***. This Court accordingly directed the Petitioners to reconstruct the demolished structures and make

5 (1996) Mh.L.J. 963.

representation to the Corporation for compensation by providing all details.

14. In the present case we find that the Respondent No.1 – Corporation has demolished the subject premises without Notice and / or granting an opportunity of hearing to the Petitioner. Section 314 of the said Act has to be read as an enabling provisions and in the facts of the present case, particularly considering that the Petitioner was suffering from 100% hearing disability and the business being his only source of livelihood, it was necessary for the Respondent No.1 – Corporation to grant a hearing to the Petitioner and pass order of demolition prior to taking the impugned action. Further, the Petitioner had in his possession the requisite licenses viz. health license and the license under the Shops and Establishments Act, for carrying out the business from the subject premises. The Petitioner had also paid the transfer charges and ground rent for 10 years i.e. upto the year 2023 with respect to the subject premises. We note that the Respondent No.1 – Corporation has by its Circular dated 5th October, 2015 provided in clause (v) that only stalls / shops having valid license under Section 313 of the said Act shall be treated as authorised stalls. However, the Circular does not mean that in every case, the power under Section 314 should be exercised

without notice. In the subject premises has a health license and a license under the Shops and Establishments Act for carrying out the business from the subject premises. The premises was demolished within 24 hours of the cancellation of licenses. The Petitioner has also disputed that the subject premises is obstructing pedestrian and vehicular traffic and / or situated on Municipal Road. The impugned order has also been passed after the demolition of the subject premises by merely relying upon the Circular dated 5th October, 2015 treating the subject premises as unauthorised. The decision of the Respondent No.1 – Corporation must be held to be flawed as there is no justification of urgency and / or requirement of expeditious removal of the subject premises without prior notice on the premise they were affecting streets, pavements, footpaths or other similar conveniences. Moreover, the Petitioner suffers from a major disability. Thus, in our view, the action of demolition carried out by the Respondent No.1 – Corporation in violation of the principles of natural justice was illegal as the facts of the case did not warrant taking of action without prior notice.

15. We accordingly pass the following order:-

- (a) It will be open for the Petitioner to reconstruct the subject premises which has been demolished at his own cost. The reconstruction will be at his own cost without claiming any equity.
- (b) While carrying out reconstruction, the Petitioner shall ensure that the area of the reconstructed premises will be the same as the area of the subject premises on the date of its demolition. The construction material of the same type shall be used for reconstruction;
- (c) Before commencement of work of reconstruction, the Petitioner shall serve the notice in writing to the Designated Officer of the concerned ward. The notice shall be advance notice of seven days mentioning the time at which the work of reconstruction shall commence. It will be open for the Designated Officer or any officer nominated by him to remain present at the time of reconstruction;
- (d) We make it clear that even if the premises are reconstructed, the same will not confer any legality on the subject premises. It will be open for the

Respondent No.1 – Corporation to take action of demolition of the subject premises, if it is constructed without obtaining development permission and / or are in violation of Section 314 of the said Act. However, such action of demolition shall not be initiated without complying with the requirements of the principles of natural justice.

- (e) If the Petitioner is not in a position to reconstruct the subject premises, the Petitioner can make an application to the Respondents to provide suitable alternate premises of equivalent area as that the subject premises and in the nearby vicinity of the subject premises in lieu of the subject premises being demolished by the Respondents. Such application shall be decided within a period of four weeks;
- (f) It will be open for the Petitioner to make representation to the Respondent No.1 – Corporation for seeking compensation for the reconstructed premises by providing all the details. Such representation, if made, shall be decided by the Respondent No.1 – Corporation and the decision shall be communicated to the Petitioner within two

months from the date of the representation. We make it clear that no adjudication is made on merits of the claim of compensation;

- (g) The order dated 11th December, 2017 passed by the Assistant Municipal Commissioner, H/E Ward, Mumbai Municipal Corporation is quashed and set aside;
- (h) The Notice dated 16th December, 2016 issued by Respondent No.3 cancelling the Trade Licence in respect of the subject premises is quashed and set aside;
- (i) Rule is made absolute on the above terms with no order as to costs;
- (j) We direct that the order of reconstruction shall not be implemented for a period of one month from the date on which this order is uploaded;
- (k) All concerned to act upon an authenticated copy of this Judgment and order.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)