

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

WRIT PETITION (Ldg.) NO. 650 OF 2018

M/s. L.J. Restaurant Pvt. Ltd.

... Petitioner

Versus

The Municipal Corporation of
Greater Mumbai & Anr.

... Respondents

Mr. Venkatesh Dhond, Senior Advocate, a/w Mr. Saket Mone, Ms. Nidhi Singh, Vishesh Kalra, Ms. Neha Joshi i/b Vidhii Partners, Advocates for Petitioner.

Mr. B. M. Chatterji, Senior Advocate, a/w Ms. Pooja Yadav, Ms. Vaishali Chaudhari, R. Basu and Ms. Maya Mazumdar for Respondents - MCGM.

Dr. Salunkhe, MOH H/West ward is present.

CORAM : S. C. GUPTE, J.

DATE : APRIL 24, 2018

P.C.

1 This petition impugns an order passed by the Assistant Commissioner, H-West Ward, Municipal Corporation of Greater Mumbai ("MCGM") on 17th February, 2018 in respect of two shops which are designated as shop nos. 7 and 8. By this

impugned order, the Assistant Commissioner observed that the petitioner had been continuously using unauthorized area in violation of compulsory open space and directed the petitioner to remove the unauthorized construction on its own, and threatened to take action as per the law, failing such compliance. The Assistant Commissioner also directed the petitioner to comply with the terms and conditions of the Health Department of MCGM and stop using unauthorized enclosed area for serving of food. The Assistant Commissioner further directed the petitioner to make the premises fire compliant as per conditions of Fire NOC and obtain fire compliance certificate from the Fire Department. The Assistant Commissioner suspended the licence granted to the petitioner for running a restaurant in the premises till such compliance certificate is obtained from the fire department. These directions are challenged in the present petition.

2 It is the case of the petitioner that after the impugned order was passed, the petitioner has now complied with each and every requirement of the fire department. It is submitted that the

only issue, which remains outstanding as of today, is the purported unauthorized status of the enclosure in front of the restaurant. It is submitted that MCGM had earlier ordered demolition of this portion on the ground that it was unauthorized and this order has since been stayed by the City Civil Court at Dindoshi in a Civil Suit filed by the plaintiff. It is submitted that since this order has been stayed by the Court, the Fire NOC cannot be denied to the petitioner on the same ground of unauthorized status of the enclosure.

3 Mr. Chatterji, learned Counsel appearing for MCGM, does not dispute that save and except the unauthorized status of the enclosure, all other objections of the fire department have been removed/complied with. MCGM does not indicate any particular condition of Fire NOC, which is yet to be complied with by the petitioner. Even the latest affidavit filed by MCGM does not refer to any particular non-compliance in this behalf. If that is so, the same order which is stayed by the Civil Court in a challenge to the order, cannot be cited or made the basis of

rejection of the Fire NOC. It is particularly to be noted that this restaurant has been running in the premises for a number of years till the impugned order suspended the licence granted to the occupant for running of a restaurant. There is also no dispute that the petitioner has only applied for a single cylinder licence and the requirements of entry and exit under the existing policy of MCGM are satisfied by the petitioner.

4 Mr. Chatterji submits that MCGM has a stated policy for allowing use of compulsory open space in front abutting the licensed eating house for food service. Learned Counsel submits that under a circular issued by MCGM on 10th October, 2001, front open space abutting a licensed eating house is allowed by the Corporation to be used as service area subject to certain conditions. It is submitted that one of the conditions is that this open space shall not be covered on top with any permanent arrangement or enclosed from sides except during monsoon period, for which a specified permission is to be obtained from the Ward Office. Learned Counsel submits that the Corporation

instead permits umbrellas to be placed over tables at proper height in the open space service area abutting the licensed eating house. The restaurant owner may in appropriate cases be permitted to provide retractable awnings of specified make of cloth / tarpaulin or such other material, such that should be retracted daily after business hours.

5 No doubt there is a declared policy of the Municipal Corporation and if any restaurant is in breach of this policy, and encloses the compulsory open space in front and abutting the eating house, the Corporation may proceed to take action against such restaurant owner. The point here is that a restaurant was being run and food being served in the enclosed area and the Corporation in fact has proceeded to take action, but that action has since been stayed by a Civil Court. Once the action is stayed, which is presumably on the footing that the action is not *prima facie* justified or that there is no *prima facie* breach of policy or illegality, the same action cannot be a ground to deny an eating house licence to the owner of the premises.

6 Mr. Chatterji points out that as a result of this order directing MCGM to practically disregard the non-compliance of its stated policy, many new restaurants may unauthorizedly enclose compulsory open spaces in front and abutting the eating houses, taking disadvantage of the order of the Court. There is no warrant for such apprehension. After all this order is expressly on the footing that the restaurant has been operating for a number of years in the enclosed open space abutting it; the Corporation has proceeded to take action against the restaurant on account of breach of its policy; that action has been stayed by the Civil Court in a challenge laid to such action by the restaurant owner; and in the face of such stay, which is presumably on the footing that it is not *prima facie* justified, the very same illegality cannot be made the basis for denying eating house licence. It does not give any *carte blanche* to new or other restaurants to enclose compulsory open space in front of and abutting their eating houses. If any party does so, the Corporation is free, and, in fact, duty bound, to proceed against such establishment. Protection

granted by this Court in this case as well as in the case of Mughal Hospitality is of no avail to such establishment.

7 In the premises, for the reasons discussed above, the Municipal Corporation is directed to consider the petitioner's application expeditiously for issuance of a Fire NOC. It is made clear that the Corporation may insist on every compliance which is due for such Fire NOC; it cannot, however, cite the reason of unauthorized status of the enclosure for denying such fire NOC.

8 Learned Counsel for the petitioner states that the petitioner shall apply to the health department of MCGM for permission to use the enclosed area for serving of food. In view of the stay order passed by the City Civil Court prohibiting removal of the alleged unauthorized enclosure, non compliance with the order of removal of the enclosure cannot be cited as a reason for refusing the permission of the health department so long as the stay granted by the Civil Court continues to operate.

9 The petition is disposed of in the above terms.

(S. C. GUPTE, J.)

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