

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

WRIT PETITION (l) NO. 1042 of 2018

Sanjeev Rajaram Chimbulkar
Aged 61 years, Occ: Businss,
res. At 409, Sai Siddhi,
Adv. Anandrao Surve Marg,
Umarchadi, Mumbai 400 009`

.. Petitioner

v/s.

1. The Municipal Corporation of Gr. Mumbai,
5, Mahapalika Marg,
Mumbai 400 001
2. The Municipal Commissioner
Municipal Corporation of Gr. Mumbai,
5, Mahapalika Marg,
Mumbai 400 001.
3. Medical Officer of Health
'B' Ward, Mumbai Office,
R.No.14, First Floor,
R Bhat Marg,
Mumbai 400 009.
4. Food Safety Officer, Gr. Mumbai
Food & Drug Administration,
341, Bandra Kurla Complex,
Bandra (E),
Mumbai 400 051
5. Food Safety Commissioner,
Food & Drug Administration,
341, Bandra Kurla Complex,
Bandra (E),
Mumbai 400 051

6. Food & Drug Administration of India,
FDA Bhavan, Kotla Road,
New Delhi 110002, India.

7. Union of India,
Aykar Bhavan,
Maharshi Karve Road,
Churchgate, Mumbai
Maharashtra 400 020

8. State of Maharashtra,
Through the Food, Civil Supplies
And Consumer Protection Dept.,
Mantralaya,
Mumbai 400 032.

..Respondents

Mr. Dorman J. Dalal for the Petitioner

Mr. Sagar Patil for the Respondent Nos.1 to 3.

Mr. Atul Singh for the Respondent No.7.

CORAM : S.C. DHARMADHIKARI &

SMT. ANUJA PRABHUDESSAI, JJ.

JUDGMENT RESERVED ON : APRIL 25, 2018.

JUDGMENT PRONOUNCED ON : AUGUST 06, 2018.

JUDGMENT (PER ANUJA PRABHUDESSAI, J.):

1. Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2. By this petition filed under Article 226 of the Constitution, the petitioner has sought the following reliefs:

“[A] That this Honourable Court be pleased to issue a writ, mandamus or writ in the nature of mandamus or any other

appropriate writ, direction and order under Article 226 of the Constitution of India, 1950 declaring that Food Safety and Standards Act, 2006 and the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 shall prevail over Section 394(1)(e) of the Mumbai Municipal Corporation Act, 1988 r/w. Part IV Schedule M of the said Act.

[B] That this Honourable Court be pleased to issue a writ, mandamus or writ in the nature of mandamus or any other appropriate writ direction and order under Article 226 of the Constitution of India, 1950, declaring that Section 394(1)(e) of the Mumbai Municipal Corporation Act 1888 read with Part (IV) Schedule M of the said Act is inconsistent and repugnant to the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 and is therefore void.

[C] That this Honourable Court be pleased to issue a writ, mandamus or writ in the nature of mandamus or any other appropriate writ direction and order under Article 226 of the Constitution of India, 1950, declaring that Section 394(1)(e) of the Mumbai Municipal Corporation Act 1888 read with Part (IV) Schedule M of the said Act is *ultra vires* Article 254 of the Constitution of India.

[D] That this Honourable Court be pleased to issue a writ mandamus or writ in the nature of mandamus or any other appropriate writ direction and order under Article 226 of the Constitution of India, 1950 declaraing that the Petitioner does not require a license under Section 394 of the Mumbai Municipal Corporation Act, 1888 since the petitioner is registered under Section 31(2) of the Food Safety and Standards Act, 2006 read with Regulation 2.1.1(5) of the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011.

[E] That this Honourable Court be pleased to issue a writ, mandamus or writ in the nature of mandamus or any other

appropriate writ direction and order under Article 226 of the Constitution of India, 1950, declaring that the seizure and confiscation by the Respondent no.3 of two commercial gas cylinders weighing 19 kgs each, one small cylinder weighing 4 kgs, two gas stoves from Shop No.2, Shree Bajrang Krupa, Advocate Anandrao Surve Marg, Umerkhadi, Mumbai 400 009 and two commercial gas cylinders weighing 19 kgs each and two gas stoves from Shop No.5, Onkar Co-operative Housing Society, Advocate Anandrao Surve Marg, Umerkhadi, Mumbai 400 009 is illegal, arbitrary and without any authority of law and is violative of Article 19(1)(g) of the Constitution of India, 1950.”

3. The petitioner runs a proprietary concern “Khadya” in shop nos.2 and 5, situated at A.A.Surve Marg, Umarkhadi, Mumbai, wherein he has been preparing and selling various types of food items. The said shops are registered under the Maharashtra Shops & Establishment Act vide registration certificates dated 18th November, 2015 and 19th December, 2016. The petitioner claims that the Officers of the respondent no.1 had informed him that he was required to obtain permission under Section 394 of the Mumbai Municipal Corporation Act. Hence, by application dated 21st November, 2016 he applied for license under Section 394 of the Mumbai Municipal Corporation Act. The Sanitary Inspector of the Respondent No.1 inspected the Shop No.2 on 22nd November, 2016. He prepared the inspection report and an offence sheet dated 25th November, 2016, which led to filing of criminal proceeding No. 4230315/SS/2016

before the Metropolitan Magistrate, 44th Court, Shindewadi, Dadar, Mumbai, for carrying on catering business without obtaining license under Section 394 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as 'MMC Act').

4. By letter dated 6th April, 2017 the petitioner was informed that his request for license was rejected for the reasons specified in the said refusal letter. The petitioner was directed to discontinue the trade within 7 days from the receipt of the said letters, failing which, action under Section 394 of the MMC Act would be initiated. The petitioner did not discontinue the said business, but he obtained Registration Certificate dated 8th May, 2017 under the Food Safety and Standard Act, 2006 (hereinafter referred to as 'FSS Act') for commencing and carrying on food business in the said premises.

5. The grievance of the petitioner is that despite registration of the shops under the FSS Act, the respondent no.3 insisted for license under Section 394 of the MMC Act, and on failure to produce the said license, the respondent no,3 seized and confiscated the gas cylinders, gas stoves from the shop no.2.

6. The petitioner contends that FSS Act, is a single comprehensive special legislation enacted by the parliament in the year 2006. In view of the provisions of section 31 of FSS Act r/w. Regulation 2.1 of the 2011 Regulation no license is required under section 394 of MMC Act. It is the case of the petitioner that the provisions under Section 394 of the MMC Act relating to license are repugnant to and are inconsistent with the provisions of Section 31 of FSS Act r/w. Regulation 2.1 of the 2011 Regulation.

7. The petitioner claims that since he has obtained Registration Certificate under FSS Act and 2011 Regulations, the respondent nos.1 to 3 have no authority to proceed under Section 394 of the MMC Act. The petitioner contends that the confiscation and seizure of the gas cylinders and gas stoves is illegal, arbitrary and is violative of fundamental rights under Article 19(1)(g) of the Constitution of India.

8. The primary issue in the present Petition is whether the petitioner is obliged to take license under Section 394(1)(e) read with Part (IV) Schedule M of the MMC Act, or whether such requirement of license as mandated by Section 394(1)(e) of MMC Act is repugnant to and inconsistent with the provisions of the FSS Act (Licensing and Registration

of Food Business) Regulations 2011.

9. On the issue of repugnancy, the Apex Court in ***Rajiv Sarin & Anr. vs State Of Uttarakhand & Ors. (2011) 8 SCC 708*** has observed thus:

28. *It is trite law that the plea of repugnancy would be attracted if both the legislations fall under the Concurrent List of the Seventh Schedule of the Constitution. Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III i.e. the Concurrent List of the Seventh Schedule of the Constitution would be invalid if its provisions are repugnant to a law passed on the same subject by the Parliament and that too only in a situation if both the laws i.e. one made by the State legislature and another made by the Parliament cannot exist together. In other words, the question of repugnancy under [Article 254](#) of the Constitution arises when the provisions of both laws are completely inconsistent with each other or when the provisions of both laws are absolutely irreconcilable with each other and it is impossible without disturbing the other provision, or conflicting interpretations resulted into, when both the statutes covering the same field are applied to a given set of facts. That is to say, in simple words, repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same field. Hence, whenever the issue of repugnancy between the law passed by the Parliament and of State legislature are raised, it becomes quite necessary to examine as to whether the two legislations cover or relate to the same subject matter or different.*

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30. *As and when there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it would also be necessary for the*

courts to examine the true nature and character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme.

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39. In nutshell, in order to attract the doctrine of repugnancy, both the legislations must be substantially on the same subject. Repugnancy in the context of Article 254 of the Constitution is understood as requiring the fulfillment of a "Triple test" reiterated by the Constitutional Bench in M. Karunanidhi v. Union of India, (1979) 3 SCC 431 @ page 443- 444, which reads as follows:-

"24. It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts.. Before any repugnancy can arise, the following conditions must be satisfied:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

40. In other words, the two legislations must cover the same field. This has to be examined by a reference to the doctrine of pith and substance.xxx"

10. Before advertng to the controversy in the present Petition, it would be appropriate to refer to the decision in ***Lalji Mulji vs The State Of Maharashtra (1965) 67 BOMLR 484*** wherein` the vires of Section 394(1) (a)(ii) of MMC Act read with Schedule M, Part II (a), (b) and (c) was called in question on the ground that the impugned section was inconsistent with the provisions of Section 31 of the Petroleum Act of 1934 and, therefore, void. The Division Bench of this court while addressing the challenge, observed that concern which motivated the amended Section 394 is to prevent an outbreak of fire, and, with that end in view, to provide for certain precautionary measures or safeguards. Referring to the expression "better provision for the prevention of fire, explosion and other-danger to life, health and property" in the statement of objects and reasons which introduced the Section 394 the Bombay Municipal Corporation Act, the Division Bench observed that the emphasis in Section 394 is on the need for additional precautions. It was observed that the Petroleum Act, which is a Central legislation, also deals with the question of storage of petroleum and petroleum products and provides for certain precautions and safeguards which were required to be taken in the matter of transport and storage of petroleum and petroleum products. However the dominant object of the Petroleum Act is not to make regulation, relating to storage. The

object of the Central legislation is far wider and covers several other matters, viz., import, export, production, refining and blending petroleum and other inflammable substances. These provisions, which extend to the entire land, are of a general character and are not designed to meet peculiar situations prevailing in crowded towns. On the other hand, the object of the impugned legislation is to make regulations relating to the storage of petrol in the City of Bombay with a view to protect life and property. The Division Bench held that the precautions under Section 394 have to be superimposed upon the precautions called upon by the Petroleum Act because of the-situation prevailing in a crowded city. The Division Bench held that there is no repugnancy or inconsistency between the impugned legislation and the central legislation. Both legislations operate in different fields, and there is no clash, much less, a collision between the two. The requirement of securing a licence from the Municipal Commissioner is a reasonable restriction in the interest of general public to safeguard their lives and property and does not violate the fundamental right guaranteed by Article 19(1)(g) of the Constitution of India.

11. In the instant Petition, the provisions under section 394(1)(e) of MMC Act are said to be inconsistent and repugnant to the provisions under

FSS Act. In order to address this controversy, it would be necessary to examine the true nature, object and scope of the provisions under section 394 (1) (e) of the MMC Act vis-à-vis Section 31 of FSS Act r/w. Regulation 2.1.2 of 2011 Regulations.

12. Section 394 (1)(e) of the MMC Act, reads thus:

“394. Certain articles [or animals] not to be kept, and certain trades, processes and operations not to be carried on without a licence; and things liable to be seized destroyed, etc., to prevent danger or nuisance.

(1) Except under and in accordance with the terms and conditions of the licence

granted by the Commissioner, no person shall—

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(e) carry on or allow or suffer to be carried on, in or upon any premises.—

(i) any of the trades specified in Part IV of Schedule M, or any process or operation connected with any such trade;

(ii) any trade, process or operation, which in the opinion of, the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the, same is, or is proposed to be carried on;

(2)xxx

(3) xxx

(4) If it appears to the Commissioner that the keeping of any article or animal or the carrying on of any trade, process or operation, in or upon any premises, is dangerous or likely to

create a nuisance within the meaning of clause (d), or paragraph (ii) of clause (e), of sub-section (1), the Commissioner may, by written notice, require the person keeping the article or animal or suffering or allowing it to be kept or the person carrying on the trade, process or operation or, allowing it to be carried on, as the case may be, to take such measures (including discontinuance of the use of the premises for any such purpose) as may be specified by him in such notice in order to prevent such danger or nuisance and if such measures are not taken within the specified time, the Commissioner may seize and carry away or seal such article or animal or any machinery or device used in connection with such trade, process or operations. Any article or animal or machinery or device so seized and carried away or sealed may be redeemed within a period of one month from the date of seizure, on payment of such sum and subject to such conditions as to future use or disposition of such article or animal machinery or device as may be fixed by the Commissioner in that behalf:

Provided that, xxx

(5) It shall be in the discretion of the Commissioner—

(a) to grant any licence referred to in sub-section (1), subject to such restrictions or conditions (if any,) as he shall think fit to specify, or

(b) for the purposes of ensuring public safety, to withhold any such licence:

Provided that, the Commissioner when withholding any such licence shall record his reasons in writing for such withholding and furnish the person concerned a copy of his order containing the reasons for such withholding:

Provided further that, any person aggrieved by an order of the Commissioner under this sub-section may, within sixty days of the date of such order, appeal to the Chief Judge of the Small Cause Court, whose decision shall be final.

13. Schedule M which is a part of Section 394 specifies the articles which cannot be kept in or upon any premises without a license. Whereas, Part IV of the Schedule enumerates trades or processes or operation connected with trades which cannot be carried on or allowed to be carried on in or upon any premises without a license. Keeping of an eating house or catering establishment is one of the trades listed in Part IV of the Schedule.

14. The FSS Act has been enacted by the parliament in the year 2006. The statement of objects and reasons states that "*the Bill inter alia incorporates the salient provisions of the Prevention of Food Adulteration Act 1954 [37 of 1954] and is based on International legislations, instrumentalities and Codex Alimentaries Commission (which related to Food Safety Norms). In a nutshell, the Bill takes care of International practices and envisages on over arching policy frame work and provision of single window to guide and regulate persons engaged in manufacture, marketing, processing, handling, transportation, import and sale of food.*" FSS Act, 2006 was enacted to achieve the aforesaid object.

15. Section 31(i) of FSS Act mandates that no person shall commence or carry on any food business except under a license. Regulation 2.1.2 of the Food Safety & Standards (Licensing & Registration of Food Business) Regulation, 2011, framed in exercise of powers conferred by Section 92 sub section 2 clause (O) r/w. Section 31 of FSS Act, states that subject to Regulations 2.1.1, no person shall commence any food business unless he possesses a valid license.

16. The object of the mandate under section 394 of MMC Act and section 31 of FSS Act was considered by the Apex Court in ***Brihan Mumbai Mahanagar Palika & Anr. v. Willingdon Sports Club & Ors., 2014(1) ALL MR 400 (S.C.)***. After considering various provisions of MMC Acts, the Apex Court has observed thus :

“12. The provisions contained in various chapters of the Act referred to hereinabove are meant for maintaining public hygiene, health and safety and also for preventing dangers to life, health and property. Schedule ‘M’, which is part of Section 394, specifies the articles which cannot be kept in or upon any premises without a licence. Part IV of the schedule specifies trades or processes or operations connected with trades, which cannot be carried on or allowed to be carried on any premises without a licence. These include keeping of an eating house or catering establishment. The object of incorporating the requirement of a licence for an ‘eating house’ or ‘catering establishment’ is to ensure that public hygiene is maintained at the

place/premises where the food is prepared and/or supplied for consumption. It is also intended to ensure safety of the people engaged in the preparation of food articles and supply thereof as well as all those who consume the articles at the particular place/premises. ...

13. ...

14. At this stage, we may also take notice of the Food Safety and Standards Act, 2006 (for short, 'the 2006 Act'). This Act provides for establishment of the Food Safety and Standards Authority of India which is mandated to lay down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto. In exercise of the powers vested in it under the 2006 Act, the Food Safety and Standards Authority of India made multiple regulations including the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 (for short, 'the Regulations'). Regulation 2.1 and 2.2 makes the obtaining of licence mandatory for commencement of any food business. Part II of Schedule IV of the Regulations prescribes general requirements of hygienic and sanitary practices to be followed by all food business operators applying for licence. Part V of Schedule IV of the Regulations prescribes the specific hygienic and sanitary practices to be followed by food business operators engaged in catering / food service establishments. xxx

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16. These provisions reinforce the determination of the legislature and the executive to ensure safety of food articles manufactured and supplied by the food business operators and others engaged in catering / food service establishments. Part V of Schedule IV of the Regulations is inclusive and covers eating houses, restaurants and hotels,

snack bars, canteens, food service at religious places, hospital catering, etc.”

17. It could thus be seen that the restrictions on storage of certain articles specified in Schedule M and or carrying on the trade specified in part IV without a license are imposed as a safeguard and precautionary measure. In terms of clauses (d), (g) and (k) of section 61 of MMC Act it is an obligatory duty of the Corporation to abate all nuisances, to take measures for preventing and checking spread of dangerous diseases and to protect life and property in case of fire. Section 63(k) also confers discretionary powers on the Corporation to take any measure not specifically provided, to promote public safety, health, or convenience. The restrictions under section 394 of MMC Act seek to regulate storage of such specified substances and thus prevent sporadic breaking out of fire, explosions etc due to improper storage or negligent handling of combustible, or hazardous substances. Similarly, restrictions on trade are intended to prevent nuisance, unhygienic conditions, spread of contagious diseases etc. and to ensure public health, hygiene and safety.

18. It is thus evident that restrictions under 394, are intended to fulfill the

mandate of Section 61 and 63 of MMC Act. Whereas the objectives of the FSS Act, which is a Central Act, is to ensure availability of safe and wholesome food for human consumption. The requirement of obtaining license and registration as per the regulation 2.1 of FSS Regulations 2011 is to regulate and monitor the manufacture, processing distribution, sale, and import of food. The provisions under the FSS Act are much wider and general in nature and do not meet the specific and peculiar exigencies covered by the MMC Act, viz. to regulate the specified trade and storage of hazardous substance so as to ensure public safety, health and hygiene. The impugned legislation and the central legislation do not cover the same field but operate in two different fields. There is thus no conflict or repugnancy between the two provisions.

19. The contention that these restrictions infringe fundamental right to practice occupation or trade of choice is devoid of any merit. There is no total prohibition on the right of the petitioner to carry on the trade or business of his choice, but the restriction is only to carry on the trade or business without the license. Suffice it to say that the right to practice any profession, or to carry on any occupation, trade, or business as guaranteed under Article 19(1)(g), is not an absolute right but is subject to reasonable

restrictions. The requirement of license, which intends to ensure public health, hygiene and safety, cannot be considered as unreasonable restriction on the right to carry on the trade guaranteed under Article 19(1)(g). The restrictions are in the interest of the general public; to safeguard their lives and property and thus satisfy the test of reasonableness laid down by Article 19(6) of the Constitution.

20. The Corporation has detailed the reasons for rejecting the license. The petitioner has neither filed an appeal against the rejection order nor has he met with the requirements specified in the rejection order. He continued with the business without a license, which is not permissible under section 394(1)(g) of MMC Act. Hence, the action of the Corporation cannot be considered to be arbitrary or illegal.

21. Under the circumstances and in view of the reasons supra, the petition has no merits and is accordingly dismissed. Rule discharged. No costs.

(ANUJA PRABHUDESSAI, J.)

(S.C.DHARMADHIKARI, J.)

Prasanna
Pradeep
Salgaonkar

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by Prasanna
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