

Sharayu Khot.

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

WRIT PETITION NO. 2184 OF 2016

Naseem Munnan Qureshi **...Petitioner**

Versus

State of Maharashtra & Ors. **...Respondents**

WITH

WRIT PETITION NO. 2639 OF 2016

RaFiquunnisa M. Khalifa (deceased) **...Petitioner**
through his Legal heir
Mr. Mohd Muqueen Qureshi

Versus

State of Maharashtra & Ors. **...Respondents**

WITH

WRIT PETITION NO. 2641 OF 2016

Mohd. Nasim Munnan Qureshi **...Petitioner**

Versus

State of Maharashtra & Ors. **...Respondents**

WITH
WRIT PETITION NO. 2642 OF 2016

Mohd. Rafiq Moh. Haroon ...Petitioner

Versus

State of Maharashtra & Ors. ...Respondents

WITH
WRIT PETITION NO. 2644 OF 2016

Mohd. Ayub Qureshi ...Petitioner

Versus

State of Maharashtra & Ors. ...Respondents

WITH
WRIT PETITION NO. 2746 OF 2016

Mohd. Wasim Munnann Qureshi ...Petitioner

Versus

State of Maharashtra & Ors. ...Respondents

Mr. Girish Godbole, a/w Mr. Omkar Khanvilkar, Mr. Devang Sharma, Ms. Priyanka Rathi, Ms. Zarna Mehta, Ms. Drasti Jani, i/by Solicis Lex, for the Petitioners.

Mr. Sukanta Karmakar, AGP, for the Respondent-State.

Mr. Anoop Patil, for Respondent-BMC in WP/2184/2016 and WP/2641/2016.

Ms. Pallavi Thakar, for the Respondent-BMC in WP/2639/2016, WP/2642/2016, WP/2644/2016 and WP/2746/2016.

**CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.**

DATE : 12 June 2018

ORAL JUDGMENT : (Per A.S. Oka, J.)

1. In some of the Writ Petitions, i.e. the Writ Petition No. 2184 of 2016 and the Writ Petition No. 2639 of 2016, notice for final disposal was issued by this Court way back on 7 June 2017. In fact, on the ground of failure of the Municipal Corporation to file a Reply, these two Petitions were ordered to be listed on 9 August 2017 for passing orders.

2. By order dated 9 August 2017 passed in these two Petitions, this Court expressed displeasure about the failure of

the Municipal Corporation to file an Affidavit in Reply in number of cases. On 5 June 2018, parties were again put to notice that these Petitions will be taken up for final disposal and in fact, the Petitions were heard for some time which were adjourned on the basis of request made by the Respondent No. 2-Municipal Corporation.

3. The facts of these Petitions are more or less similar. In Writ Petition No. 2184 of 2016, the case made out by the Petitioner is that he was running a shop for selling pan for several decades at the location described in paragraph 1a of the Petition. The Petitioner is relying upon a licence granted by the Health Department under Section 394 of the Mumbai Municipal Corporation Act, 1888 (for short "*the said Act*"). According to the case of the Petitioner, on 10 December 2015, one of the Officers of the 2nd Respondent-Municipal Corporation visited the shop premises and prepared a survey report. He directed the Petitioner to produce the documents. Accordingly, the Petitioner replied by a letter dated 21 December 2015, in which he

claimed that he was in possession for several decades. There was a detailed Reply submitted by the Petitioner on 14 March 2016 to the Senior Inspector of the Licence Department, which records that the licence earlier granted to the Petitioner under Section 313 of the said Act has been cancelled by the Assistant Commissioner. Along with the said letter, the Petitioner forwarded the documents. In the Petition, it is pointed out that on 1 March 2016, no objection certificate was issued by the Designated Officer. It is pointed out that at 6.30 p.m. on 25 May 2016, the Petitioner was served with the letter dated 25 May 2016 (Exh.G to the Petition) signed by the Medical Officer of Health, H/West Ward by which he was informed that the Health Licence granted under Section 394 of the said Act to the Petitioner is revoked and cancelled with retrospective effect from 7 April 2016. It is pointed out in the Petition and it is not disputed by the Corporation that immediately on the next day i.e. on 26 May 2016, the shop premises of the Petitioner was demolished.

4. There is a Reply dated 21 August 2017 is filed by Shri. Rajesh Yadav, Assistant Engineer (Maintenance), H/West Ward to this Petition. In the Reply it is contended that the Petitioner did not possess a licence under Section 313 of the said Act. Secondly, it is contended that by the order dated 25 May 2016, the licence under Section 394 of the said Act was revoked with effect from 7 April 2016. Thirdly, it was contended that the said shop/stall was on a Municipal sewer line of Bandra Station Road. It is stated that as the stall was obstructing the pedestrian or vehicular traffic and for aforesaid reason, it was demolished on 26 May 2016. It is further stated that after demolition of the stall, the Petitioner was called upon to produce the documents for deciding his eligibility for rehabilitation. After the documents were produced, the Assistant Commissioner passed an order holding that as the Petitioner has failed to prove the existence of the shop prior to 1 January 1962, he was not eligible. The Municipal Corporation relied upon the judgment and order dated 13 January 2016 in the Writ Petition (L) No. 45 of 2016 and other Petitions of a Division

Bench of this Court, which according to the case of the Municipal Corporation holds that such a structure on a Municipal sewer line can be demolished without notice.

5. In Writ Petition No. 2639 of 2016, the facts pleaded are similar. However, in the subject structure of the Petitioner, he was running a restaurant. The Petitioner in this Petition relied upon a licence granted under Section 313(1) of the said Act. Otherwise, the facts pleaded are similar to Writ Petition No. 2184 of 2016. There is a Reply filed by the Municipal Corporation of the same Officer Shri. Rajesh Yadav raising the same contentions.

6. In Writ Petition No. 2641 of 2016, the Petitioner was having a shop in the name and style as Danish Kabab Corner. The address of the said shop is mentioned in paragraph 2a of the Petition. The Petitioner is relying upon various licences including a licence under the Food Safety and Standards Act, 2006 and a licence under Section 394 of the said Act.

Otherwise, the facts pleaded are similar. Even the stand taken by the Municipal Corporation in the Affidavit of Shri. Rajesh Yadav is the same.

7. In Writ Petition No. 2642 of 2016, the case of the Petitioner is that he was running a restaurant in the subject structure. The location of the restaurant is described in paragraph 2b of the Petition. He has also relied upon the various licences granted. The facts are otherwise similar. The Reply filed by Shri. Rajesh Yadav has taken the same stand.

8. In Writ Petition No. 2644 of 2016, the case of the Petitioner is that he was running a sweetmeat shop in the subject structure. The Petitioner is relying upon various licences and including a licence under the Food Safety and Standards Act, 2006. He is also relying upon the licence granted under Section 394 of the said Act. In the Reply filed by Shri. Rajesh Yadav, similar stand has been taken. However, in this case, there is no termination of licence granted under Section 394 of

the said Act.

9. In Writ Petition No. 2746 of 2016, the case of the Petitioner is that he was running a restaurant at the place mentioned in paragraph 2b of the Petition. In this case also, Health Licence granted under Section 394 of the said Act was revoked on 25 May 2016 with retrospective effect. The stand taken in the Reply filed by Shri. Rajesh Yadav is similar.

10. The learned Counsel appearing for the Petitioners in support of these Petitions contended that the very fact that in all these cases except one, the licences granted under Section 394 of the said Act were revoked on 25 May 2016, a day prior to the demolition, and that also with retrospective effect, shows malafides on the part of the Municipal Officers. It is submitted that there is no material placed on record to show that the structures subject matter of these Petitions were constructed on a sewer. He submitted that except for the bald statement that the structures were on sewer, there is no material

placed on record. He submitted that even in one of the cases, there was a licence granted under Section 313 of the said Act. He submitted that these are the cases where the structures were high handedly demolished without following the due process of law and therefore, it is a fit case where the Court should order restoration of the structures of the Petitioners and payment of compensation.

11. The learned Counsel representing the Municipal Corporation sought time in the last week as well as today. In view of what is stated in paragraph 2 above, time cannot be granted. The submission based on a decision of a Division Bench which is relied upon the Reply is that the Municipal Commissioner has a power under Section 314 of the said Act to demolish the structures without notice, as the same were situated on a sewer. The submission is that none of the Petitioners had a valid licence under Section 313 of the said Act. It submitted that the structures of the Petitioners were constructed illegally and were obstructing pedestrian or

vehicular traffic as the structures were situated in a crowded and congested locality near Bandra Railway station. The learned counsel for the Municipal Corporation submitted that though the case of the Petitioners for eligibility for rehabilitation is already considered, the Municipal Corporation is likely to reconsider their cases. Another submission is that during the visits of the Municipal Officer of the Licence Department, the Petitioners were called upon to stop the business and they were put to notice that an action will be taken. The learned Counsel submitted that from the letter dated 6 March 2016 submitted by the Petitioners to the Senior Inspector of the Licence Department, it is very clear that the Petitioners were given a Show Cause Notice for cancellation of the licence under Section 394.

12. We have given careful consideration to the submissions. It will be necessary to make a reference to the stand taken by the Municipal Corporation in the Affidavit in Reply of Shri. Rajesh Yadav, which is more or less identical in all

cases. Therefore, we are conveniently referring to the stand taken in Writ Petition No. 2184 of 2016 and in particular, paragraph 5 thereof. Clauses (a) to (d) of paragraph 5 read thus:-

“(a) I say that the present petitioner was carrying on the business in the name of Raj Pan Shop in a stall on the municipal sewer line of Bandra Station Road. I say that the circular dated 05.10.2015 under No. DMC/RE/3290, it was directed that the unauthorised stalls which are not having the license under Section 313 of MMC Act are to be removed which are obstructing to the pedestrian or vehicular traffic. The petitioner did not possess any license under Section 313 of MMC Act.

b) I say that the present premises was inspected by the concerned staff of health department when

some violation were found and the petitioner was called upon to produce the valid papers of the shop within two days. I say that as per order dated 25.05.2016 the health license No. 761471075 is revoked and cancelled with effect from 07.04.2016. The copy of the said order is at Exhibit 1 to the present petition. The petitioner has not challenged the said order and hence the same is accepted by the petitioner.

- c) I say that as the said business was carried on the municipal sewer line and obstructing the pedestrian and vehicular traffic on Municipal road as well as the petitioner did not produce the licence issued under Section 313 of the M.M.C. Act and hence, the same was unauthorised and was demolished on 26.05.2016. I shall crave leave to refer to and rely upon the photographs taken at

the time of demolition.

- d) *I say that the petitioner has submitted the documents on 28.07.2016 to the Respondents after demolition of the premises. I say that there were total 9 structures which were demolished on the same day. I say that the documents filed by the petitioners were scrutinized by these respondents. I say that Asst. Commissioner, H/West ward has passed an order dated 25.10.2016. It is mentioned therein that for tolerating commercial structure, the petitioner has to prove with documents that the structure is in existence prior to 1.1.62 and the petitioner has not filed any documents to prove that the structure was in existence prior to datum line. Hereto annexed and marked Exhibit '1' is the copy of the said order. The copy of the order is served*

upon the petitioner by hand and the same is acknowledged by him. The same is also served by post on the same day i.e. on 25.10.2016.”

13. Thus, what is pleaded is that the impugned action was taken under Section 314 of the said Act. It is not disputed that no prior notice of demolition was served upon the Petitioners and no opportunity of being heard was granted to them. Section 314 reads thus:-

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

The Commissioner may, without notice, cause to be removed—

(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 [in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 [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.”

14. Section 313 of the said Act reads thus:-

“313. Prohibition of deposit, etc., of things in streets.

(1) No person shall, except with the written permission of the Commissioner, –

(a) place or deposit upon any street or upon any open channel, drain or well in any streets (or in any public place) any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction thereto or encroachment thereon;

(b) project, at a height of less than twelve feet from the surface of the street, any board, or shelf, beyond the line of the plinth of any building, over any street, or over any open channel, drain, well or tank in any street;

(c) attach to, or suspend from, any wall or portion of a building abutting on a street, at a less height than aforesaid, anything whatever.

(2) Nothing in clause (a) applies to building materials.”

15. The power under Section 314 of the said Act is to remove without notice anything erected, deposited or hawked in contravention of Section 312 and 313 or 313A of the said Act. The Municipal Corporation is relying upon clause (a) of Section 314 of the said Act by contending that the structures were on a drain. It is the specific case made out in the Reply that the Municipal Corporation was justified in taking action without issuing a notice as it is permissible under Section 314 of the said Act.

16. The Municipal Corporation has contended that an action was taken under clause (a) of 314 of the said Act as the structures were situated on a sewer. It is not the case that the structures were situated on a street or on open channel or a well or a tank. Therefore, it is necessary to consider whether the structures were on a sewer. Even assuming that the action was taken under clause (b) of Section 314, in view of subsection (1) of Section 313, it is necessary to examine whether the structures were on a sewer. We must note here that as per

definition of drain in clause (a) of Section 3 of the said Act, the same includes sewer.

17. Firstly, the Municipal Corporation has not produced any document to show that before demolition of the subject structures, after carrying out inspection, any Officer of the Municipal Corporation came to a conclusion that the structures were on a Municipal sewer. The power of the Commissioner under Section 314 of the said Act to remove the structures can be exercised only if a case is covered by clauses (a) to (d) under Section 314 of the said Act and in this case clauses (a) and (b) as the Municipal Corporation has not invoked Clauses (c) and (d). Therefore, unless the Commissioner or any other Officer who is empowered in the law to exercise the power of the Commissioner, on the basis of material on record, comes to a conclusion that a structure which does not have a licence under Section 313 of the said Act is on a sewer and unless the said Officer comes to the conclusion that an action of demolition should be taken without notice, no

Officer of the Municipal Corporation can take recourse to Section 314 of the said Act and demolish a structure without notice. Moreover, the power to remove the structure without notice is a discretionary power. In every case, the Municipal Commissioner need not exercise the said power, unless he comes to the conclusion that the situation warrants removal of a particular structure without notice.

18. There is a power vesting under Section 314 of the said Act to dispense with notice before taking an action of demolition. However, the requirement of application of mind by the Commissioner or the authorised Officer of the Municipal Corporation to the issue whether the structure is on drain, well, etc. is not dispensed with. An action of demolition under Section 314 could have been taken only after the Commissioner or an Officer empowered to exercise powers of the Commissioner was satisfied that the structure was on a drain which needs to be demolished. On 5 June 2018, when the Petitions were heard, this Court had called upon the learned Counsel for the

Municipal Corporation to produce the record showing that there was such an application of mind by a Competent Officer before demolition of the structures. We wanted to know whether any such decision taken after application of mind was recorded on anywhere on file. However, today morning when the matters were called out, not a single document was produced by the Municipal Corporation. After submissions were made, a request was made to take the Petitions in the Afternoon Sessions to enable the Municipal Corporation to produce the files. Accordingly, the matters were taken up in the afternoon session. However, the files are not produced in the Afternoon Session also.

19. There is one more aspect in all these cases except one. The Municipal Corporation has purported to cancel the Health Licence issued under Section 394 of the said Act on 25 June 2016 with retrospective effect from 7 June 2016. Within 24 hours from the service of the said order of revocation in the evening of 25 May 2016, the subject structures were

demolished. We are shocked to note that the Health Licences granted under Section 394 of the said Act were revoked in this fashion without notice and without giving an opportunity of being heard and that also with retrospective effect from 7 April 2016. Passing such order with retrospective effect shows the approach of the Municipal Corporation. As stated earlier, in one case, there was a licence granted under Section 313 of the said Act.

20. The Municipal Corporation could have lawfully exercised the powers under Section 314 of the said Act by demolishing the structures without notice provided some Competent Officer was satisfied that a case was made out to take such an action.

21. There is no material placed on record to show that the Commissioner or an Officer empowered to exercise his powers, visited the site or perused the record and came to a conclusion that the structures were situated on a drain or sewer.

Therefore, the condition precedent for the exercise of powers under Section 314 of the said Act was not satisfied and no material to that effect is placed before the Court.

22. By taking such drastic action without notice, the Municipal Corporation has deprived the Petitioners of their livelihood. The action is absolutely arbitrary which is violative of Article 14 of the Constitution of India. Subsequent action of deciding the issue of eligibility for grant of alternate accommodation is completely irrelevant, as the question is whether the action of demolition is legal. We in no uncertain terms hold that the action of demolition was completely illegal.

23. In normal course, this Court would have permitted reconstruction of the demolished structures at the same place. However, it is pointed out that the structures were on the side of a very congested street near Bandra Railway Station. We, therefore, propose to direct the Municipal Corporation to provide constructed shops having the same size

to the Petitioners in the same locality or nearby locality. If the Municipal Corporation fails to offer alternate accommodation within the specified time, a permission will have to be granted to the Petitioners to re-erect the stalls / shops at the places where it originally existed. In such a case, after the stalls are erected, the Municipal Corporation will be entitled to follow due process of law for demolishing the same.

24. Therefore, the Petitions must succeed and we pass the following order:-

- (i) We direct the Mumbai Municipal Corporation to allot to the Petitioners stalls / shops of the same size which were demolished on 26 May 2016 in the same locality or in nearby locality;
- (ii) The locality shall be such that the Petitioners are in a position to carry on the same business which they were carrying on in the demolished

structures;

- (iii) The Allotment shall be made to the Petitioners as expeditiously as possible and in any event, within a period of two months from the date on which this judgment and order is uploaded;
- (iv) The Petitioners will be liable to pay the fees/charges, if any, which were payable in respect of the demolished structures;
- (v) On the failure of the Municipal Corporation to erect/allot the stalls / shops as directed above within the period of two months from the date on which this judgment and order is uploaded, it will be open to the Petitioners to re-construct their structures/stalls at the places where the same were situated;

- (vi) However, the re-construction shall be made by using the same construction material and that also with advance notice at least of 48 hours to the Designated Officer of the concerned Ward who or his nominee shall be entitled to remain present at the time of re-construction;
- (vii) We make it clear that in respect of re-constructed shops, the Petitioners will not be entitled to claim any equity. If the original stalls which were demolished were illegal, it will be always open for the Municipal Corporation to initiate an action of demolition of the re-constructed stalls in accordance with law;
- (viii) As far as the prayer for compensation is concerned, it will be always open for the Petitioners to make appropriate representation to the Municipal Corporation along with all the

particulars and documents. If such representations are made, the Municipal Corporation shall decide the same within a period of three months from the date of filing of the representations;

- (ix) The Petitions are made absolute in the above terms with no order as to costs.;
- (x) All concerned to act upon an authenticated copy of the judgment and order.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]