

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3335 OF 2017

Kishanlal Udaylal Jain]
Aged 57 years of Mumbai, Indian]
Inhabitant and residing at 4th floor,]
Ava Mansion, 103, Bora Bazar Street]
Fort, Mumbai – 400 001]
Through the Power of Attorney Holder]
Mr. Girish Kishanlal Jain]..... Petitioner.

Versus

1] Mumbai Municipal Corporation for]
Greater Mumbai through R V]
Pradhan, Senior Legal Assistant]
'A' Ward, Mumbai – 400 001]
]]
2] State of Maharashtra]
(Notice to be served on the Public]
Prosecutor, High Court, Bombay)]..... Respondents.

Mr. Samir A Vaidya for the Petitioner.
Ms. Prachi Tatake a/w Mr. Kunal Waghmare for Respondent No.1/BMC.
Mr. Vinod Chate, APP, for the Respondent/State.

CORAM : S. S. SHINDE, J
DATE : 04th July 2019

JUDGMENT :

1 Rule, with the consent of the learned counsel for the parties made
returnable forthwith and heard.

2 This Writ Petition is filed for the following substantial relief :-

(a) this Hon'ble Court be pleased to invoke the powers
vested in it under Article 227 of the Constitution of
India and Section 482 of the Cr.P.C. and be pleased

to call for the records and proceedings in CCF No.4100562/SS/15 pending on the files of Ld. M. M. 41st Court, Shindewadi, Dadar, Mumbai and upon ascertaining the legality and propriety thereof be pleased to quash and set aside CC No.4100562/SS/15 pending on the files of Ld. M. M. 41st Court, Shindewadi, Dadar, Mumbai”

3 The learned counsel appearing for the Petitioner Mr. Samir Vaidya submits that the Assistant Engineer (B&F), ‘A’ Ward, Mumbai Municipal Corporation was not authorized to issue notice inasmuch as the powers under the Mumbai Municipal Corporation are vested with the Commissioner. He submits that unless the powers vested with the Commissioner are delegated by the Commissioner to the Deputy Commissioner and in turn by the Deputy Commissioner to the said Engineer, the notice issued to the Petitioner is not legally sustainable. In support of the aforesaid contention, the learned counsel for the Petitioner has placed reliance upon the observations made by this Court (Coram : Karnik D.G., His Lordship then was) in the matter of **Vasant S Naik v/ s. Municipal Corporation of Greater Mumbai & Anr.**¹ in particular paragraph 10 on-wards. It is submitted that on the aforesaid ground alone this Petition deserves to be allowed. The learned counsel for the Petitioner further drew this Court’s attention to the contents of the notice and submitted that in the light of the provisions of Section 381 of the Mumbai Municipal Corporation Act (for short “the said Act”), none of the grounds mentioned in the said notice can be sustainable. It is further submitted that the Petitioner has kept wooden box

1 2009 (1) Bom. C.R. (Cri.) 157,

outside of his house, and keeping the said wooden box would not cause any nuisance or would not cause collection of water in which mosquitoes breed or are likely to breed at the place where the wooden box is kept. The sum and substance of the submissions made by the learned counsel for the Petitioner is that, firstly the officer who has issued the notice has not been empowered to issue the said notice, and secondly none of the grounds stated in Section 381 of the said Act can be made applicable to the case of the Petitioner keeping in view of the fact that the Petitioner has only kept wooden box outside of his house.

4 Per contra, the learned counsel appearing for Respondent No.1-Municipal Corporation Ms. Prachi Tatake drew this Court's attention to the instructions issued by the Legal Department of Brihanmumbai Mahanagarपालिका on 19th January 2015 and submitted that the Junior Engineer is authorized to issue such a notice. She further invites this Court's attention to the accompaniments of the said instructions and submits that even the officer of the rank of Assistant Engineer is empowered to issue notice under Section 381 of the said Act. She further invites this Court's attention to the delegation of powers by the Deputy Municipal Commissioner (Zone-I), Municipal Corporation of Brihan Mumbai, authorizing the Assistant Engineer (Bldg & Factory) 'A' ward to exercise, perform and discharge the powers given to the Deputy Commissioner subject to the control and revision of the Commissioner.

The learned counsel further submits that the reliance placed by the learned counsel for the Petitioner on the the judgment of this Court in the case of **Vasant Naik** (Supra) is misplaced in the facts of the present case, inasmuch as in the said case no specific document was placed on record either during trial or before the High Court showing delegation of powers to the authority who issued notice in the facts of the said case to the Petitioner in the said case. It is submitted that in the present case, as already submitted, the documents are placed on record showing specific deletion of powers to the Assistant Engineer (B&F), 'A' ward, Mumbai Municipal Corporation authorizing him to issue notice under Section 381 of the said Act.

5 It is submitted that whether the said wooden box which is kept outside the house of Petitioner has caused nuisance or otherwise is the matter for consideration during the trial and not at the stage of issuance of notice by the said authority. It is submitted that while exercising extraordinary writ jurisdiction or inherent powers under Section 482 of the Criminal Procedure Code, in routine course High Court will not undertake exercise of appreciation of disputed question of facts. Therefore the learned counsel for the Respondent No.2 – Mumbai Municipal Corporation prays that this Petition may be rejected.

6 Upon appreciation of rival contentions and perusal of the

documents placed on record which make it clear that the powers are delegated to the Assistant Engineer (B&F) 'A' Ward of the Mumbai Municipal Corporation including powers of issuing notice under Section 381 of the said Act. In the said context it would be apposite to reproduce Section 381 of the said Act which reads thus :-

“ 381. Filling in of pools, etc., which are a nuisance

[(1) (i) For the purposes of this section a nuisance shall include----- -

(a) any pool, ditch, tank, well, pond, quarry-hole, drain, water course or any collection of water; or

(b) any cistern or other receptacle for water or any article or thing capable of collecting rain water during the monsoon season whether within or outside a building; or

(c) any land on which water accumulates or is likely to accumulate; or

(d) any premises or any part of any premises occupied, or unoccupied, or under construction, reconstruction or demolition; which in the opinion of the Commissioner is, or is likely to become a breeding place of mosquitoes or which is, in any other respect, a nuisance as defined in clause (3) of Section 3.

(ii) The Commissioner may, by notice in writing, require the person by whose act, default or sufferance, a nuisance arises, exists or continues, or is likely to arise, and the owner, lessee and occupier of the land, building or premises on which the nuisance arises, exists or continues or is likely to arise or any one or more of such person, owner, lessee and occupier, to remove, discontinue or abate the nuisance by taking such measures and by executing such work in such manner and within such period of time as the Commissioner shall prescribe in such notice.

(iii) The Commissioner may also by any notice under clause (ii) or by another notice, served on such person, owner, lessee and occupier, or on any one or more of them, require them or any one or more of them, to take all steps requisite or necessary to prevent a recurrence of the nuisance and may, if he thinks it desirable, specify any work to be executed or measures to be carried out for that purpose, and may serve any such further notice notwithstanding that the nuisance may have been abated or removed if he considers that it is likely to recur:

Provided that if at any time within four months from the date of the service of any such notice, the nuisance recurs through the failure of the person or persons upon whom such notice has been served to comply with the requirements contained in such notice, such person or persons shall be liable without any further notice to the penalties provided in this Act for offences under this section.

(iv) Where the nuisance arises or exists or is likely to arise or recur in connection with the construction, reconstruction or demolition of any premises, or any part of any premises, the Commissioner may in addition to serving any notice on any one or more of the persons mentioned in clause (ii) serve any such notice on any architect, contractor or other person employed to carry out such work of construction, reconstruction, or demolition and also on any sub-contractor employed by such contractor or other person, or any one or more of such contractor, person and sub-contractor]

(2) If [any person who, by a requisition made under sub-section (1), is required] to fill up, cover over or drain of a well, delivers to the Commissioner, within the time prescribed for compliance therewith written objections to such requisition, the Commissioner shall report such objections to the [Standing Committee] and shall make further inquiry into the case, and he shall not institute any prosecution under section 517 for failure to comply with such requisition except with the approval of the [Standing Committee], but the Commissioner may nevertheless, if he

deems the execution of the work called for by such requisition to be of urgent importance, proceed in accordance with section 489 and, pending [the Standing Committee] disposal] of the question whether the said well shall be permanently filled up, covered over or otherwise dealt with, may cause such well to be securely covered over, so as to prevent the ingress of mosquitoes, and in every such case the Commissioner shall determine, with the approval of [4] [the Standing Committee], whether the expenses of any work already done as aforesaid shall be paid by such [person], or by the Commissioner out of the municipal fund or shall be shared, and, if so, in what proportions.]

381-A. Permission for new well, etc.

(1) No new well, tank, pond, cistern or fountain shall be dug constructed without the previous permission in writing of the Commissioner.

(2) If any such work is begun or completed without such permission the Commissioner may either----

(a) by written notice require the owner or other person who has done such work to fill up or demolish such work in such manner as the Commissioner shall prescribe, or

(b) grant written permission to retain such work, but such permission shall not exempt such owner from proceedings for contravening the provisions of subsection (1).]

381-B. Prohibition of mosquito breeding in collection of water on any land

No person shall, on any land owned by him or in his possession,-

(a) have, keep or maintain any collection of standing or flowing water in which mosquitoes breed or are likely to breed, or

(b) cause, permit or suffer water on such land to form a collection in which mosquitoes breed or are likely to breed,

unless such collection has been so treated as effectively to prevent such breeding.

Explanation I--- Through used for cattle and in frequent use shall not, until the contrary is proved, be deemed to be collection of water in which mosquitoes breed or are likely to breed.

Explanation II --- The natural presence of mosquito have larvae in any standing or flowing water shall be evidence that mosquitoes are breeding in such water.]

7 In so far as delegation of powers vested in the municipal authorities to the sub-ordinate officers of the Corporation are concerned, the relevant provision is Section 68 of the said Act, which for the sake of ready reference, is reproduced herein under :-

“68 Delegation of powers of Municipal Authorities :

Any of the powers, duties and functions conferred upon, assigned to or vested in the Corporation, the [Mayor], Commissioner or the General Manager, Brihan Mumbai Electric Supply and Transport Undertaking, by or under this Act, may be exercised, performed or discharged by any municipal officer to whom such powers, duties or functions are delegated by the concerned authority by general or special order made, from time to time, in this behalf]”

8 In so far as the as the contention of the learned counsel for the Petitioner as regards delegation of powers is concerned, it would be apposite to refer to the annexures of Writ Petition from pages 62 to 65 (the said pages are illegible) relating to delegation of powers by the Additional Municipal

Commissioner (City), Brihan Mumbai Mahangarpalika to the Junior Engineer and also by the Deputy Municipal Commissioner (Zone-I) to the Assistant Engineer which for the sake of ready reference are reproduced herein under :-

DELEGATION OF POWERS

Under the powers vested in me under Section 68 of the Mumbai Municipal Corporation Act, 1888, I Shri Vasant P Prabhu, Deputy Municipal Commissioner (Zone – I) for Brihanmumbai, do hereby authorized Shri Kiran R Bhangre, Junior Engineer (Bldg & Factory), 'A' Ward to exercise and perform the following powers and functions of the Planning Authority throughout Greater Mumbai under the following Sections of the said Act.

EXPLANATION : The entries in the 2nd column of the below table headed "Brief description of the powers & functions to be exercised & performed" are not intended as definitions described in the Section, Sub-Section of these Section, Sub-section, but are inserted merely as reference to the subjects of the Section, sub-Section & the numbers of which are given in the first column :-

<i>Section</i>	<i>Nature of powers duties and functions delegated</i>
233	To inspect and examine all drains, ventilation, shafts and pipes, cess pools of house gullies, water closets, privies, latrines and urinals to which this section applies.
254	To cause the 2work authorized by this section to be done for the purpose of inspection and examination under Section 25.
255	To fill in, reinstate and make good as provided in this section.

257	Making requisitions on owners of premises as provided in Sub-Section (1) for doing work mentioned in Sub-Section (2).
314	To remove without notice things placed or deposited upon Clause any clause, place or attached or suspended in.
(b)	Contravention of Clause (a) or Clause (c) of Sub-Section (1) of Section 313.
322(3)	To remove without notice any building materials or any scaffolding or any temporary erection or any posts, bars, ralls, boards or other things by way of enclosures which have been deposited or set up in any street, without the permission of authority specified in Sub-Section (1) or which having been deposited or set up without permission or authority have not been removed within the period specified in the notice issued under Sub-Section (2).
324 (Sub-Sec.2)	To restore streets or pavements reinstate in Sub-Section (1) this Sections on failure of persons responsible for doing ----
329	To require and secure adoption of measures to protect and enclose dangerous places.
347 (a) B and C	Prohibiting user of a non-residential buildings or chawl to a residential one and of a residential building or chawl to that of godown, warehouse, workshop, workplace, factory, stable or motor garage prohibiting making or causing any alternations in an existing building originally constructed or authorised to be used for human habitation for the purpose of using it or causing it to be used as a godown, warehouse, workshop, work place, factory, stable or motor garage.
---	To inspect ----- of buildings during erection or work such as description in Section ----- execution.
----	To require removal ----- or dangerous structure and to temporarily secure etc. or repair etc.
---	To issue a written notice to stop within the specified period the erection of the work unlawfully carried or commenced upon any premises.
---	To direct removal or ----- carrying on erection of building or the execution of any such work is described in Section 342
368	To require owners to provide receptacles of a size for collection of dust, ashes, refuse, rubbish and trade refuse etc.
374	To Inspect buildings or or premises for the purpose of ascertaining the sanitary condition thereof.

375	To require cleansing and lime washing of any building etc.
375A	To require the owners to remove building materials or debris etc accumulated due to house collapsed etc.
377A	To require the owners of the buildings to abate the nuisance arising from rain, water leading from the roofs of the buildings or to prevent the recurrence.
377(1)	To require cleansing, cleaning or enclosing any premises overgrown with rank vegetation etc.
381	To require the owners of the building to abate the nuisance arising out of defects.
390(1) (2) & (3)	Regulation of factories of licenses or written permission given under the Act.
479 (Sub Sec.5)	To require production of licenses or written permission given under the Act.
488	To enter into or upon building or land with or without assistants or workmen for inspection, survey or execution of work.

Dated this --- this day of October 2011

Sd/-

(Vasant P Prabhu)

Additional Commissioner (Zone-I)

Municipal Corporation of Brihan Muimbai

Municipal Commissioner (Zone – I)

BRIHANMUMBAI MAHANAGARPALIKA
DELEGATION OF POWERS.

Under the powers vested in me under Section 68 of the Mumbai Municipal Corporation Act, 1888, I Shri Vasant P Prabhu, Deputy Municipal Commissioner (Zone – I) for Brihanmumbai, do hereby authorized Shri Dhotre Keshav Yallappa, Asst. Engineer (Bldg & Factory), 'A' Ward is hereby empowered to exercise, perform and discharge under the control and subject to the revision of the Commissioner, the under mentioned powers, duties and

functions conferred or imposed upon or vested in the Commissioner by the several sections, sub-section and clauses of the said Act herein below mentioned :-

EXPLANATION : The entries in the 2nd column of the below table headed “Brief description of the powers & functions to be exercised & performed’ are not intended as definitions described in the Section, Sub-Section of these Section, Sub-section, but are inserted merely as reference to the subjects of the Section, sub-Section & the numbers of which are given in the first column :-

Sections	Brief description of the powers & functions to be exercised & performed
381	To require the owners of the buildings to abate the nuisance arising out of defects

Dated this 16th day of June 2014

Sd/-
(Vasant P Prabhu)
Dy. Municipal Commissioner (Zone-I)
Municipal Corporation of Brihan Mumbai.

MUNICIPAL CORPORATION OF BRIHAN MUMBAI

DELEGATION OF POWERS

Under the powers vested in me under Section 68 of the Mumbai Municipal Corporation Act, 1888, I Shri Vasant P Prabhu, Deputy Municipal Commissioner (Zone – I) for Brihanmumbai, do hereby authorize Shri Jadhav

Dinesh P Mukadam (Bldg & Factory), 'A' Ward to exercise and perform the following powers and functions of the Planning Authority throughout Greater Mumbai under the following Sections of the said Act.

EXPLANATION : The entries in the 2nd column of the below table headed "Brief description of the powers & functions to be exercised & performed' are not intended as definitions described in the Section, Sub-Section of these Section, Sub-section, but are inserted merely as reference to the subjects of the Section, sub-Section & the numbers of which are given in the 1st column :-

Section	Nature of powers duties and functions delegated
483	Service of Notice by whom to be served or presented
484	Service how to effected on owners of premises and other persons.
485	Service on "owner or occupier" of premises how to be effected.
488	To enter in to or upon buildings or land with or without assistants or workman for inspection, survey or execution of work.

Dated this 2nd day of 9 2014.

Sd/-
(Vasant P Prabhu)
Dy. Municipal Commissioner (Zone-I)
Municipal Corporation of Brihan Mumbai.

9 The contents of aforesaid documents would make it clear that the Assistant Engineer is empowered to issue notice under Section 381 of the said Act. It is true that in the case of **Vasant S Naik** (supra) no document was placed on record showing that the authority who issued notice in the said case

was empowered/authorized by the Commissioner/Deputy Commissioner to issue notice and prosecute further proceedings on behalf of the Municipal Corporation.

10 It is the contention of the learned counsel for the Petitioner that merely keeping wooden box outside the house that itself would not cause the nuisance or it cannot be said that the water can accumulate which creates a breeding place of mosquitoes or it will invite nuisance, and therefore, the notice given under Section 381 of the said Act is not legally sustainable keeping in view the provisions of Section 381 of the said Act. In that respect I find considerable force in the submissions made by the learned counsel for Respondent No.2 – Corporation that while exercising extraordinary writ jurisdiction or inherent powers under Section 482 of the Criminal Procedure Code, in routine course High Court will not undertake exercise of appreciation of disputed question of facts. The Petitioner will get an opportunity to agitate the aforesaid contentions by filing reply to the notice and also in further proceedings arising out of the aforesaid notice.

11 The learned counsel for the Petitioner also contended that the notice issued by the said authority is at the behest of the landlord since the proceedings are pending before the Small Causes Court, Mumbai though there is no ground to issue the impugned notice. At the cost of repetition such a

ground taken by the Petitioner cannot be appreciated in the present Writ Petition.

12 For the reasons afore-stated, there is no substance in the Writ Petition. The Writ Petition stands rejected. Rule is accordingly discharged.

[S. S. SHINDE , J]