



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 15393 OF 2023

Shaikh Babu s/o Shaikh Mohammad ... **Petitioner**
Age 57 years, Occu: Business
R/o Mughalpura, Near Panchakki
Kohinoor Colony, Aurangabad

.....

VERSUS

1. The State of Maharashtra,
Through its Secretary,
Urban Development and Welfare
Department, Mantralaya, Mumbai-32
2. The Municipal Co Corporation, ... **Respondents**
Aurangabad,
Through Its Commissioner.

Mr. Akram Inamdar, Advocate h/f Adv. S. S. Kazi for the Petitioner
Mr. A. B. Girase, the Government Pleader, for Respondent No. 1 State
Mr. S. S. Tope, Advocate for the the Respondent No. 2

CORAM : RAVINDRA V. GHUGE, &
Y. G. KHOBRAGADE, JJ.

DATE ON : 19-12-2023.

JUDGMENT: (Per- Y. G. Khobragade, J.)

1. Rule. Rule made returnable forthwith. With the consent of both sides, heard finally at the stage of admission.

2. Heard at length Mr. Akram Inamdar, Advocate, the learned counsel appearing for the Petitioner and Mr. A. B. Girase, the Government Pleader appearing for the Respondent No.1 State and Mr. S. S. Tope, the learned counsel appearing for the Respondent No. 2 Municipal Corporation.

3. The Petitioner has put forth prayer clauses (B) as under:

"(B) By issuing writ of mandamus or any other writ or direction in the like nature, the impugned notice/ communication dated 29-11-2023 issued by respondent no. 2 bearing No. 64/2023 be quashed and set aside.

4. The learned counsel for the petitioner in vehemence canvassed that, the Petitioner has been running a tea stall near the main gate of the Government Hospital & Training Institute (for the sake of brevity, herein after to be referred as "G. H. A. T .I"). Initially in the year 1984, the petitioner was inducted as a tenant on a small portion admeasuring 3 X 6 Ft., on rent of Rs. 30/- per month. The Petitioner is serving Tea to the patients, relatives of the patients, Doctors, Medical Staff Members. Therefore, the business of the petitioner flourished at the said place. Respondent No. 2 Municipal Corporation extended the portion of the premises to 6X18 Ft., and increased rental charges per month. Presently, the petitioner is paying Rs. 25,896/- toward annual rent. Accordingly, on 08-06-2022, the petitioner paid the said rental charges. There are few more shops which are given on rent by Respondent No. 2 near main gate of G. H. A. T. I . So also, there are encroachments on road side. Therefore, the Respondent No. 2 Municipal Corporation published a public notice thereby giving a notice period to the encroachers for removal of the encroachment in the daily Newspaper "Lokmat" dated

28-10-2023. Therefore, the petitioner apprehends removal of his shop, though he is not an encroacher. The petitioner was granted portion of land by the Respondent No. 2 and lease/rent amount been regularly paid by the Petitioner. Therefore, on 17-10-2023, the Petitioner submitted a representation to Respondent No. 2 stating that he has been running the tea stall with due permission of the Corporation and hence, he is not an encroacher and therefore, his stall should not be removed.

5. The learned counsel for the petitioner further canvassed that, the petitioner is having Licence under the Bombay Shops and Establishment Act. The Petitioner had filed the Suit bearing R. C. S. No. 1244 of 1996 for perpetual injunction restraining Respondent No. 2 i.e. Municipal Corporation from removing his Tea Stall. On 15th July, 1997, the VIth Joint Civil Judge (Sr. Dn.,) Aurangabad passed the Judgment and order, thereby restrained Respondent No. 2 it's agents, servants from removing the tea house of the plaintiff, except by following the due process of law. Thereafter, the petitioner had submitted representations dated 3-7-2006 and 4-8-2006 to Respondent No. 2, but those representations remained undecided. Therefore, the Petitioner had filed Writ Petition No. 89 of 2007 and had prayed for directions to decide the representation. On 12-01-2007, the Co-ordinate bench of this Court passed an order and directed Respondent No. 2 to decide the petitioner's representations in accordance with law and to communicate the said order to the petitioner. Therefore, the petitioner's possession over the land in question and Tea stall is neither unauthorised nor an encroachment. On 29-11-2023, the petitioner was served with a notice u/s 478 (1) of the Maharashtra Municipal Corporation Act calling upon him to remove Tea Stall within 24 hours. Therefore, the impugned notice is illegal bad in law.

6. Per contra, Adv. Tope, the learned counsel appearing for the Respondent no. 2 strongly resisted claim of the petitioner on the ground that, no permanent land or structure was given to the petitioner either on written lease or rent. The petitioner erected a Tea Stall near the main Gate of "G. H. A. T. I", beside the road. Therefore, as per the property Tax Rules, meager amount of tax towards rent was collected from the petitioner. So also, the petitioner deposited Rs. 25,896/- on 08/06/2022 till 31-03-2023, which is already expired and no further rent or lease amount received from the petitioner. The petitioner is an encroacher and structure of his tea stall is illegal and unauthorised. Therefore, he has prayed to dismiss the present petition.

7. Having regard to the submissions canvased on behalf of respective parties, we have perused the record. It is an undisputed fact that, the petitioner is running a tea stall near the main gate of the Medical College and Hospital since 1984 under the valid Licence issued under the provisions of Bombay Shops and Establishment Act. The petitioner claimed that, he has been inducted as a tenant and paying annual rent to the Respondent No. 2, but the Petitioner has not produced any written Lease Agreement or Rent Agreement. Prima facie it appears that, initially the petitioner encroached upon land admeasuring 3X6 Ft., but later on he expanded the area to 6X18 Ft. Indeed, the petitioner deposited amount of Rs. 25,896/- as annual rent till 31-03-2023 and the said period is already over. Therefore, it cannot be said that, the possession of the petitioner over the land and structure in question is legal. It is not the case of petitioner that, he has valid title over the portion of land on which Tea Stall is standing. It is apparent that Respondent No. 2 officials have been accepting such rent amounts without there being any lease agreement. There is no provision of law

cited by the Corporation under which it could have accepted the rent/lease amount from the petitioner.

8. Needless to say that the Petitioner had filed a suit bearing R.C.S. No. 1244 of 1996 for perpetual injunction restraining Respondent No. 2 Municipal Corporation from removing his Tea Stall. On 15th July, 1997, the 6th Joint Civil Judge (Sr. Dn.,) Aurangabad delivered a Judgment and Decree and restrained Respondent no. 2 it's agents, servants from removing the tea stall, except by following the due process of law.

9. It further appears that, on 12-01-2007, a Co-Ordinate bench of this Court (Coram: P V. Hardas And Shri P .R. Borkar, JJ.) passed an order in Writ Petition No. 89 of 2007, thereby directing Respondent No. 2 to decide the representations dated 3-7-2006 and 4-8-2006 of the Petitioner in accordance with law and to communicate its decision to the petitioner. But the petitioner has not pleaded, whether his possession over the Tea Stall has been regularised. Therefore, it would be difficult to accept the contention of the petitioner about his legal possession over the Tea Stall.

10. In case of *Olga Telis -Vs- Municipal Corporation, Grater Bombay, AIR 1986 SC 180*, the Hon'ble Apex Court held that, even the encroachers should not be removed without following the due procedure of law.

11. In the case of *M. M. Sangtani -VS- Dhule Nagar Palika (Municipal Council), Dhule, AIR 1994 Bom., 189*, the petitioners were possessing tenements belonging to the Municipal Council, Dhule for

carrying on petty business, for more than 20 years under the licence from the Municipal Council, Dhule under the Shops and Establishments Act for carrying on their business in the tenements in question and that they were paying taxes to the Municipal Council from time to time. On 1st March, 1987, some officers of the Municipal Council, Dhule along with a number of its workers came to the premises of the petitioners for demolition of the same on the ground that they were encroachers on the public road, then the petitioners instituted suits in the Court of Joint Civil Judge, Junior Division, Dhule and also sought temporary injunction. The trial Court was satisfied that it was a fit case and by order dated 7th March, 1987 temporary injunction was issued to the petitioners as prayed by them. Appeals were preferred by Dhule Municipal Council, the 3rd Additional District Judge, Dhule by a common judgment and order, dated 27th August 1990 set aside the order of the Joint Civil Judge, Junior Division, dated 7th March 1987, granting an injunction in favour of the petitioners. The learned Appellate Court find that prima facie case stood in favour of the Appellant. However, it was observed that, irreparable harm and inconveniences may not be sufficient criteria for granting an interim injunction. The Appellate Court held that while considering the point of balance of convenience, it was necessary to see the surrounding prevailing circumstances and welfare of the general public at large; that it was indispensable to protect the rights of community rather than the individual rights. It is in this background that following observations were made by this Court:

"7. I have carefully considered the rival submissions. I fully agree with the counsel for the respondent that the object of demolition cannot be totally disregarded in considering the prayer for temporary injunction. But, I am also conscious of the fact that where valuable rights of the citizens are involved and shops in their occupation for long 20 years are sought to be demolished,

the courts are entitled and in fact required to look into the balance of convenience of the shop-owners. Prima facie merit of the case and balance of convenience of the parties cannot be given a good-bye on the ground that "what is sought to be done is for the happiness of many". The principles governing grant of temporary injunction are too well settled to need reiteration. Ordinarily an injunction should be issued if the court is satisfied that (a) a prima facie case exists (b) the balance of convenience is in favour of granting injunction and (c) if injunction is not granted irreparable injury would be caused to the party praying for injunction which cannot be compensated in terms of money. An interlocutory injunction should normally be granted to restrain an apprehended or threatened injury where the injury is certain and imminent or where the mischief likely to be done is of an overwhelming nature viz. demolition and destruction of property.

8. In the instant case I am, therefore, of the clear opinion that the approach of the 3rd Additional District Judge, Dhule in the matter was not correct. Having accepted the prima facie contentions of the petitioners regarding long standing possession of the petitioners, issue of licence to them under the Shops and Establishments Act for all these years, granting electric connection etc. and also having recorded a categorical finding that there was a prima facie case in favour of the petitioners for grant of interim injunction, the Additional District Judge was not justified in setting aside the order of the trial Court granting temporary injunction on the basis of the philosophy propounded by him in his order."

12. In the case of ***Govindbhai R. Chauhan v. Gokulchand J. Agarwal*** MANU/MH/1062/1994MANU/MH/1062/1994: **1996(2) Mh.L.J. 1062**, it has been held that a trespasser in settled possession can seek temporary injunction to protect his possession till he is dispossessed in accordance with law.

13. In the case of ***Vinayak S. Bapat v. Superintendent of Police, Chandrapur and Ors.***, MANU/MH/0652/2005MANU/MH/0652/2005 : 2006 (2) Mh.L.J 97 : **AIR 2005 Bom. 328**, this Court [Shri J.N. Patel

and B.P. Dharmadhikari JJ] has considered the issue of removal of encroachment and observed in para 26 & 27 as under:

Para 26: One of the excuses pleaded by respondent No 3 Municipal Council is pendency of issue in subordinate Courts. The parties to these court proceedings are not before us. Hence it is not possible for us to make any effective or binding comment on any of these proceedings. However the law on the point in relation to encroachments or hawkers is considered above and were also made reference to judgment of Hon'ble Apex Court in case of Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan reported at MANU/SC/0051/1997MANU/SC/0051/1997: AIR1997SC152 (supra). In paragraph 27 below we have also extracted the important observations in this respect. It is apparent that plaintiff or applicant who wants his encroachments on public Road to be protected by any interim order has to satisfy the court about existence of any legal right in his favour to maintain such encroachment during pendency of suit and for that purpose, he has to point out some title in him authorising him to occupy the portion of public Road or footpath etc., In the absence of any such legal right, the encroacher cannot be permitted to obstruct the free flow of traffic or cause inconvenience to public at large. Mere long possession or user cannot be an answer to tilt the balance in his favour when in other pan of balance, the Court has to way interest of public at large. Even the threat of losing source of livelihood cannot be, by itself a circumstance in favour of such applicant. He encroached upon public road or footpath knowing fully well that nobody can clothe him with authority to occupy and use it for his private gain. He cannot feign ignorance of provisions of Law and try to raise equity in his favour. Court of Law cannot permit such wrongdoer to continue to injure public at large during pendency of suit. Hence, his plaint itself must contain sufficient material and facts to satisfy the court that the convenience and interest of public at large must suffer because of legal right in his favour, which will be a very rare case.

27. Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan reported at MANU/ SC/0051/ 1997 MANU/ SC/ 0051/1997 : AIR1997SC152 (supra) is the judgment which lays down law on the point of removal of encroacher from

public lands/road. Following observations therein are important:

9. The Constitution does not put an absolute embargo on the deprivation of life or personal liberty but such a deprivation must be according to the procedure, in the given circumstances, fair and reasonable. To become fair, just and reasonable, it would not be enough that the procedure prescribed in law is a formality. It must be pragmatic and realistic one to meet the given fact situation. No inflexible rule of hearing and due application of mind can be insisted upon in every or all cases. Each case depends upon its own backdrop. The removal of encroachment needs urgent action. But in this behalf what requires to be done by the competent authority is to ensure constant vigil on encroachment of the public places. Sooner the encroachment is removed when sighted, better would be the facilities or convenience for passing or re-passing of the pedestrians on the pavements or footpaths facilitating free flow of regulated traffic on the road or use of public places. On the contrary, the longer the delay, the greater will be the danger of permitting the encroachers claiming semblance of right to obstruct removal of the encroachment. If the encroachment is of a recent origin the need to follow the procedure of principle of natural justice could be obviated in that no one has a right to encroach upon the public property and claim the procedure of opportunity of hearing which would be a tedious and time-consuming process leading to putting a premium for high-handed and unauthorised acts of encroachment and unlawful squatting. On the other hand, if the Corporation allows settlement of encroachers for a long time for reasons best known to them, and reasons are not far to seek, then necessarily a modicum of reasonable notice for removal, say two weeks or 10 days, and personal service on the encroachers or substituted service by fixing notice on the property is necessary. If the encroachment is not removed within the specified time, the competent authority would be at liberty to have it removed. That would meet the fairness of procedure and principle of giving opportunity to remove the encroachment voluntarily by the encroachers. On their resistance, necessarily appropriate and reasonable force can be used to have the encroachment removed. Thus considered, we hold that the action taken by

the appellant-Corporation is not violative of the principle of natural justice.

14. In the case of **Municipal Council-vs- Kundanlal Mohanlal Jaiswal and Ors., 2007 (3) Mh. L.J. 155**, it has been held that, mere long possession or threat of losing source of livelihood cannot be taken as a circumstance in favour of the encroacher. If an encroachment is recent, then there is no requirement to follow principles of natural justice. However, if Municipality allows settlement for a long time then reasonable notice must be served.

15. In the case of **Mohd. Suleman v. S.O., Municipal Corporation of Hyderabad, AIR1994AP275** , it has been observed as under:

"10. Following the ratio of the Supreme Court's decision in Sodan Singh case (supra), I hold that the petitioners have no legal right to insist that they should be permitted to retain their structures on a busy road margin when the road itself is sought to be widened nor can it be said that till an alternative accommodation is shown by the Municipal Corporation, the petitioners have a right to continue their business even at the cost of holding up the road widening programme. No doubt, a scheme has been directed to be framed in Sodan Singh's case (supra) to regulate the street trading and to rehabilitate some of them in the zone specially selected for squatting/hawking and while considering the scheme prepared by a Committee, the Supreme Court pointed out the need to adopt a compassionate approach so as to ensure that genuine squatters/hawkers are not denied their daily bread on the altar of technicalities [vide para-2 of Saudan Singh case (supra)]. But nowhere it is spelt out that in all cases of encroachment of public roads and streets by poor for the purpose of making their livelihood , a proposal for rehabilitation in an alternative place is a condition precedent for taking any step to remove the encroachment. A large section of pavement vendors in the city of Delhi called for a special approach especially having regard to the fact that the permission to squat was being granted to the traders on daily basis or for short periods by the Corporation itself. The Corporation itself conducted a survey and prepared a scheme to

determine the categories of persons to be considered for grant of permission to squat subject to availability of space. In framing the scheme, the hawkers/squatters in busy areas having severe traffic congestion were allotted space for their business in some less busy areas. The case of two or three persons running mechanical workshops by putting up temporary structures on the road margin are not comparable to cases of large section of squatters/hawkers considered by the Supreme Court in the aforementioned case, especially when the road widening work had to be urgently undertaken in public interest. It is not even the case of the petitioners that they were prepared to go to any place or that they approached the Municipal Corporation for a grant of suitable site at a non-objectionable place."

16. In the case of **Dr. H. S. Rikhy -vs New Delhi Municipal Committee, AIR 1962 S.C. 555**, the Hon'ble Apex Court held that, the use of the word "Rent" in receipts passed by a Municipality to the occupiers of the shops in the market constructed, by itself is not conclusive that relation of landlord and tenant is created between the Municipality and the said occupiers. The word "rent" may be used in the legal sense as amount paid by the tenant to the landlord for the exclusive possession of the premises occupied by him. It may also be used in the generic sense, without importing the legal significance aforesaid of compensation for use and occupation. "Rent" in the legal sense can only be reserved on a premise of immovable property. Hence, the use of the term 'rent' cannot preclude the landlord from pleading there is no relationship of landlord and tenant. The question must, therefore, depend upon whether or not there is a relationship of

landlord and tenant in the sense that there is a transfer of interest by the landlord in favour of the tenant.

17. In the case in hand, the rent period for which the petitioner has deposited an amount already lapsed on 31-03-2023. As per the view taken by the Hon'ble Apex Court in case of Dr. H. S. Rikhy, (supra) the alleged rent receipt relied upon by the petitioner is not conclusive proof to create any right that, the petitioner is the tenant/lessee of the Respondent No. 2. Further, said alleged rent receipt does not create any proprietary in favour of the petitioner. Respondent No. 2 has found various other encroachments on the road side in front of main gate of the G. H. A. T. I., due to which there is always a hurdle for ingress and egress of the patients, visitors, Ambulance and obstructions to traffic flow. Therefore, Respondent No. 2 has served the notice dated 29-11-2023 and called upon the Petitioner to remove encroachment within 24 hours as the period of Tea Stall has expired on 31-03-2023, which does not appear to be illegal or bad in law. Therefore, considering ratio laid down in above cited judgments, it is clear that, a mere plea that the petitioner is running the Tea Stall since 1984 does not establish his right to carry on business on a public street.

18. Respondent No. 2 is an artificial person created under the provisions of the Municipal Corporation Act. Therefore, it is the Petitioner who has to establish that the possession of land in question

was given to him in accordance with the provisions of the Municipal Corporation Act. However, nothing has been brought on record to show that the possession of the land in question was given to the petitioner in accordance with the provisions of law. It is to be noted that, the petitioner got sufficient time to make alternate arrangements after receipt of notice for removal of encroachment, but as already stated above, the petitioner desires to prosper at the cost of the general public which cannot be tolerated at all, moreso since such encroachments have become a nuisance in front of the Govt. Medical College and Hospital.

19. In view of the above discussion, **this Writ Petition is hereby dismissed.** Rule is discharged. No order as to cost.

(Y. G. KHOBRAGADE, J.)

(RAVINDRA V. GHUGE, J.)

JPChavan