

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2039 OF 2023

Shivaji Dattatray Bhandgire & Ors. ... Petitioners

V/s.

Sarjerao Ishwar Kanade & Ors. ... Respondent

Mr. Vaibhav R. Gaikwad for the petitioners.

Mr. Drupad Patil with Mr. Dheeraj Patil and Mr.
Rishikesh A. Mohite for respondent Nos.1 to 11.

Mr. P.P. Pujari, AGP for respondent No.12/State.

Mr. Paras Yadav for i/by Mr. S.M. Patil respondent
No.13.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 10, 2023

PC.:

1. The petitioners are challenging order dated 8 June 2021 passed in Miscellaneous Civil Appeal No.95 of 2001 by the District Judge-4, Kolhapur granting injunction against the defendants from creating structure or fixing cabins or granting permission to sell food items over the public street till the disposal of the suit.

2. Though the order was passed on 8 June 2021, the petitioners did not challenge the order immediately. The writ petition is filed only on 2 February 2023. Explanation furnished by the petitioners

is that they were under the impression that the order is not to be challenged since there is no objection from anyone from carrying out business as per the order. It is only after Municipal Council issued notice to the petitioners, they filed the writ petition.

3. In my opinion, considering the documents on record, it appears that there is no permission granted by the Municipal Council to the petitioners to carry on business of hawking on the public street. Therefore, the explanation for filing the writ petition after period of one and half year is not acceptable. The writ petition, therefore, liable to be dismissed on the ground of delay/laches in filing the writ petition.

4. However, in view of subject matter of the writ petition, I am considering the writ petition on merits. Respondent Nos.1 to 11 filed Regular Civil Suit No.215 of 2021 seeking a declaration and injunction that the State of Maharashtra and the concerned Municipal Council or their agents have no right to permit the defendants from causing obstruction to the traffic and to the students. In the said suit, respondent Nos.1 to 11 filed an application for temporary injunction restraining the State of Maharashtra and Municipal Council from allowing the petitioners to carry on business on the public street having effect of causing disturbance to the traffic and students.

5. Curiously, the Municipal Council filed written statement contending that the petitioners were carrying out the business on North side of Murgud school for last 20 years. The Municipal Council was recovering rent from the petitioners. The road ad-

measures 40 feet. According to the Municipal Council, the width of the road is sufficient to accommodate the traffic and will not cause obstruction to the traffic. It is also stated that the Municipal Council had passed a resolution for development of the said road as “Khau Galli”. Under the said scheme, a person will be allotted cabin admeasuring 8x8 feet and there shall be 20 cabins on the said road. 15 feet public street shall be utilized for the said purpose. Still road having 25 feet shall be available for traffic. The State Government sanctioned Rs.5 crore towards the development of the project. The contractor appointed has carried out substantial work but the project is yet to be completed. The Municipal Council, therefore, prayed for dismissal of the suit.

6. The State Government filed written statement which is affirmed by the Chief Executive Officer of the Municipal Council. Though the defendant No.1/State of Maharashtra admits existence of cabin on the road, according to the State Government the project to develop it for Khau Galli is sanctioned. Except stating aforesaid two statements, nothing more is stated in the written statement.

7. The Trial Court by order dated 8 April 2021 rejected the plaintiffs’ application holding that the material does not indicate that the suit property is on main public road with heavy traffic and the issue as to whether the construction being carried out by the petitioners is permanent in nature or not needs to be decided during trial.

8. The Appellate Court allowed the Appeal on following

grounds: (i) the petitioners are carrying out permanent construction by erecting RCC column as well as RCC beams, plinth by using structural beam; (ii) the structures proposed by the defendants on the said road are of permanent nature; (iii) without sanction of the State Government, the Municipal Council cannot reduce the width of the road; (iv) the suit road is not reserved for Khau Galli in the development plan and the result of Municipal Council's decision will permanently reduce the width of the said road to 15 feet.

9. It appears that despite issuance of such injunction on 8 June 2021, no action was taken against the petitioners. Hence, respondent Nos.1 to 11 filed an application under Order 39 Rule 2A of the Code of Civil Procedure, 1908 for initiating action of contempt of Court against the defendants. The application was filed in the month of September 2021. However, even after filing of such application, no action was taken by the Municipal Council or the State Government against the petitioners till issuance of notice dated 9 January 2023. It is only after issuance of notice dated 9 January 2023, the petitioners have filed present writ petition.

10. Learned advocate for the petitioners submitted that the petitioners are carrying out business on the said place for last more than 20 years. Relying on the provisions of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 ("the Street Vendors Act" for short) submitted that till the survey of street vendors is carried out under Section 3 of the said Act, no street vendor can be evicted till the survey of vending

certificate is issued to the street vendors.

11. Per contra, learned advocate for respondent Nos.1 to 11 invited my attention to the cause-title of the writ petition to urge that the age of the petitioner Nos.6, 9, 10 and 11 indicates that prior to 20 years they were minors and, therefore, the plea raised by the petitioners is false. He submitted that accepting stand of the Municipal Council that the project of Khau Galli was initiated in 2019. As per the averments in the written statement, the project is yet to be completed. It is only after such project is completed and the defendant No.2 permits petitioners, they could have claim rights to carry on business on the public street. According to him, such project cannot be implemented on the suit property as this Court in Writ Petition No.652 of 2017 held that no hawking zone can be created within 100 meters from any place of worship, holy shrine, educational institution and hospital and within 150 meters from any municipal or other market or any railway station. He invited my attention to the resolution of sanction of the project of Khau Galli which indicates that the suit property is abutting school and, therefore, within 100 meters from the school activity of hawking could not have been permitted by the Municipal Council. He placed reliance on the judgment of the Division Bench of this Court in Original Side Writ Petition (P) NO.3962 of 2018 in **Venkat A. Bhasha Boina v. Mumbai Municipal Corporation & Anr.** decided on 11 October 2019.

12. Rival contentions fall for consideration. Taking into consideration the issue involved, it is necessary to set out relevant observations of the Division Bench of this Court in **Venkat Boina**

(supra). Paragraphs 33 and 34 reads thus:

“33. In the Order passed and a very detailed one in the case of **Shri Vile Parle Kelvani Mandal and others vs. Municipal Corporation of Greater Mumbai and others** {Writ Petition No.224 of 2011} together with Public Interest Litigation No.36 of 2010 {**Janhit Manch and others vs. Brihanmumbai Municipal Corporation and others**} nowhere have we found a finding or conclusion which prevents the Municipal Corporation from shifting or relocating the stall holders who are obstructing or prejudicially affecting pedestrian and vehicular movement on a busy and congested road leading to a railway station. More so, when the consistent policy is that, none should hawk within 100 metres of any place of worship, holy shrine, educational institutions and hospitals and within the periphery of 150 metres of any Municipal or other market or from any railway station. Now, this policy of the Municipal Corporation and the stand of the general public found acceptance in both the Judgments relied upon by Mr. Vashi. There has never been any restriction imposed nor we find the Municipal Corporation prohibited from removing hawkers within 150 metres of a railway station or within very close proximity thereof. This has always been the position in law. No statute nor any Judgment can be read as recognising absolute, unconditional and unrestricted right to hawk on public street. By their very nature, public streets are meant for vehicular and pedestrian movements and rather they are dedicated to the use of public. They are the property of the public. They cannot be used nor occupied by anybody in a manner causing inconvenience to the members of the public. Equally, none squatting on a public road or a pavement or footpath abutting it can dictate to the Municipal Corporation that they should not be removed or shifted even if their activities result in obstruction and inconvenience to movement of the public at large. The public interest is

therefore paramount.

34. Merely because there is a Parliamentary enactment relied upon and which, according to the petitioners, has not been implemented strictly in accordance with the provisions thereof, does not mean that we should interfere with the impugned orders at the instance of few persons like the petitioners. The petitioners cannot dictate to the general public as to how they must reach a railway station or their work place or residence. We, therefore, cannot uphold the stand of the petitioners.”

13. In the light of aforesaid judgment of the Division Bench of this Court, present case needs to be considered. On perusal of the material on record, it appears that there is neither a license nor permission granted to the petitioners by the Municipal Council to carry on business on the public street. The project sought to be implemented by the Municipal Council includes construction of road and other construction necessary for implementation of the project. Such project is implemented from the year 2019 and is yet to be completed. Therefore, there is no question of the Municipal Council permitting petitioners to carry on business either by issuance of license or by any other manner.

14. The Municipal Council being State under Article 12 of the Constitution of India is expected to take decision fairly without favouring either the individuals or any other persons. The stand taken by the Municipal Council opposing the prayer of the plaintiffs gets strength from the subsequent conduct of the Municipal Council by not taking action against the petitioners despite order of injunction dated 8 June 2021. Despite filing

application under Order 39 Rule 2A of the Code of Civil Procedure, 1908 in September 2021, till 8 January 2023 no action was taken by the Municipal Council against the petitioners which leads to the inference that the Municipal Council is acting in collusion with the petitioners and failed to perform their statutory duty to maintain public street open.

15. Learned advocate for the petitioners then relied on Section 3 of the Street Vendors Act. The provisions of the said Act came up for consideration before the Division Bench of this Court in the case of **Venkat Boina** (supra) and the Division Bench relying on the earlier judgment of the coordinate Bench of this Court held that no hawking zone can be created or erected within 100 meters from any place of worship, holy shrine, educational institution and hospital or even 150 meters from any municipal or other market or from any railway station. From the resolution passed by the Municipal Council, description of the suit property and the material on record it is clear that the school is on the street which is being utilized for the implementation of Khau Galli project. Since the suit property is situated within 100 meters from the school, the petitioners are not entitled to the protection of the Street Vendors Act.

16. Therefore, in my opinion, the lower Appellate Court was justified in allowing the appeal and restraining the Municipal Council. Therefore, there is no merit in the writ petition.

17. The writ petition accordingly stands dismissed. No costs.

18. Since this Court by order dated 3 February 2023 protected the petitioners, the said protection will continue for a period of four weeks from today.

(AMIT BORKAR, J.)