

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

APPEAL FROM ORDER NO.851 of 2023

WITH

INTERIM APPLICATION NO.16281 OF 2023

RAMESHWAR
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Samantawadi Mahila Vikas }
Foundation A Non Govt. Organization }
Under the provisions of Societies Registration }
Act, through its Authorized Representative }
Ms. Fatima Khalil Hussain Sayed }
having office at 1st floor Sujat Mansion }
S.V. Road, Andheri (West), }
Mumbai 400 058 }..Appellant

Versus

Municipal Corporation of }
Greater Mumbai, a statutory body }
incorporated under Mumbai Municipal }
Corporation Act 1888 having its }
registered office at Mahapalika }
Bhavan, Mahapalika Marg, }
Mumbai }Respondents

WITH

APPEAL FROM ORDER NO.852 OF 2023

WITH

INTERIM APPLICATION NO.16283 OF 2023

Mumbaikar Peace and Welfare }
Society A Non Govt. Organization }

Under the provision of Societies Registration }
 Act, having office at 1st floor Sujat Mansion }
 S.V.Road, Andheri (West), }
 Mumbai 400 058 through its Authorized }
 Representative Imran Patah }...Appellant

Versus

Municipal Corporation of }
 Greater Mumbai, a statutory body }
 incorporated under Mumbai Municipal }
 Corporation Act 1888 having its }
 registered office at Mahapalika }
 Bhavan, Mahapalika Marg, }
 Mumbai-400 001 }Respondents

...

Mr. Mayur Khandeparkar i/by Mr. Dilip Shukla, Advocate for Appellant in both AO.

Mr. Anil Singh, Senior Advocate a/w Mr. Aadarsh Vyas, Ms. Preeti Gokhale i/by Mr. R.Y. Sirsikar Advocates for MCGM.

Mr. Sandesh Jadhav, Sub-Engineer (M) K/W Ward, Mumbai, Present.

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CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 3 NOVEMBER 2023

PRONOUNCED ON : 9 NOVEMBER 2023

JUDGMENT

1. By these appeals, Appellants challenge orders dated 04.10.2013 passed by the learned Judge of City Civil Court dismissing Notice of

Motion Nos. 3372 of 2023 and 3373 of 2023. The City Civil Court has refused to grant temporary injunction in favour of the Appellants / Plaintiffs to restrain the Respondent-Municipal Corporation from implementing or enforcing the Revocation Letters dated 13th July 2023 and / or from dispossessing the Plaintiffs from the suit premises.

2. The Municipal Corporation for Greater Mumbai (**MCGM**) has constructed two structures bearing Gymnasium Centre No. 1 and Gymnasium Centre No. 2 by utilizing funds of a Member of Parliament at Yusuf Meher Ali Recreation Ground, Gilbert Hill, Andheri (West) Mumbai. The Municipal Corporation decided to make available the said two Gymnasium Centres to the members of public. At the request of the Appellants in Appeal no. 851 of 2023 (Samantawadi Mahila Vikas Foundation), the Municipal Corporation decided to allot Gymnasium Centre no.1 to it. Accordingly, agreement for the period from 01.12.2011 to 30.10.2012 was executed with Samantawadi Mahila Vikas Foundation in respect of Gymnasium Centre No.1 on caretaker basis. It appears that Gymnasium Centre no.1 remained closed for repairing works during 2012 to 2016. Later, Gymnasium Centre No. 1 was again allotted to Samantawadi Mahila Vikas Foundation and Accordingly, an agreement came to be executed on 1st March 2016 in respect of period from 1 March 2016 to 28 February 2017. The agreement was renewed from time to time from by executing agreements for the period 4 December 2017 to 3 November 2018 and 4 October 2019 to 3 September 2020.

After 3 September 2020, no further agreement has been executed with Samatawadi Mahila Vikas Foundation.

3. Similarly, Gymnasium Centre No. 2 was allotted to Appellant in AO No. 852 of 2023-Mumbaikar Peace and Welfare Society for the year 2016-2017 and the same was continued from time to time and remained in force up to 31.07.2020. No further agreement is executed with Mumbaikar Peace and Welfare Society after 31.07.2020.

4. The Respondent-Municipal Corporation issued Show Cause Notices to both the Appellants on 7 November 2022 stating that the Municipal Corporation had received complaints about handing over Gymnasiums to third party on rental basis. It appears that the notices were issued on account of complaints made by one Shri Asif Sayyed. Responses were sought within 7 days. Both the Appellants submitted replies to the show cause notices on 14.11.2022 denying the allegations therein. The Municipal Corporation apparently conducted site inspection of both the Gymnasiums on 21.01.2023 and found that both the Appellants were operating the same. Accordingly, the complainant Shri Asif Sayyed was informed vide letter dated 26 April 2023 that the Appellants were found to be operating Gymnasiums during visit conducted on 21.01.2023. While Appellants were under impression that the issue was given a quietus, suddenly the Municipal Corporation issued Revocation Letters dated 13.07.2023 stating that the occupation of Gymnasiums by Appellants was illegal after expiry of the tenure of

the agreements. It was further alleged that the Gymnasium Centres were being misused by another agency M/s. A S Fitness Factory. It was further alleged that Appellants had unauthorisedly added some construction. Accordingly, the Municipal Corporation revoked the permission for use of Gymnasium Centre Nos. 1 and 2 and informed the Appellants that possession thereof would be taken over by the Municipal Corporation. Both Appellants were called upon to hand over the Gymnasium Centres as per clause 32 of the agreements within of 7 days.

5. Appellants approached the City Civil Court by filing LC Suit Nos. 2505 of 2023 and 2506 of 2023. In their suits, they filed Notices of Motion Nos. 3372 of 2023 and 3371 of 2023 seeking temporary injunction to restrain Municipal Corporation from acting upon Revocation Letters dated 13.07.2023. The Municipal Corporation filed affidavit in reply *inter alia* contending that both the Gymnasiums were sealed by the Municipal Corporation on 13 September 2023. The City Civil Court has proceeded to dismiss both Motions by orders dated 04.10.2023, which are subject matter of challenge in the present appeals.

6. Mr. Mayur Khandeparkar the learned counsel would appear on behalf of the Appellants and contend that the Revocation Letters dated 13.07.2013 are *ex-facie* illegal as no show cause notices were issued prior to issuance of the said letters. That, the earlier show cause notices dated 7 November 2022 were closed on account of issuance of reply dated 26 April 2023 to the complaint stating that no unauthorised use

was found in the Gymnasium Centres. That therefore the show cause notices dated 7th November 2022 cannot be treated as the ones issued before passing the impugned Revocation Letters dated 13 July 2023. That MCGM acted on subsequent complaint of the very same complainant for issuing Revocation Letters dated 13.07.2023 ignoring the fact that the Complainant was informed on 26 April 2023 that the Appellants were operating Gymnasiums. He would submit that language employed in the Revocation Letters would indicate that permissive use of the Gymnasium Centres was allowed till issuance of Revocation Letters and that the possession thereof was always with Appellants. That letters for renewal of tenure submitted by Appellants on 1 September 2020 are pending with Municipal Corporation and that the renewal was under consideration. He would submit that in similar manner, renewal of several other Gymnasium Centres in the vicinity are under consideration. Despite expiry of their agreements, no action is taken against them and that the Municipal Corporation is selectively acting against the Appellants.

7. Mr. Khandeparkar would further submit that the allegation of subletting against the Appellants is totally misconceived as M/s. A.S. Fitness Factory is merely a trainer to some of the patrons in the Gyms. The receipts issued by the said trainer do not reflect address of the Gymnasiums. That, in absence in the fresh show cause notices alleging operation by that trainer, Appellants could not put forth the said justification before the Municipal Corporation. That, the allegation of

various constructions on upper floor is also misconceived in view of work orders issued by Municipal Corporation of erection of open shed on the upper floor of the Gymnasiums.

8. Mr. Khandeparkar would further submit that Appellants are in lawful possession of the Gymnasium Centre and cannot be dispossessed except by following due process of law as envisaged under Section 105B of the Mumbai Municipal Corporation Act, 1888 and would rely upon the Judgment of Division Bench of this Court in ***Balwant Chatrabhuj Thakkar Vs. Commissioner, Municipal Corporation of Gr. Mumbai & Ors.***¹ He would further submit that Clause 26 of the agreement authorising unilateral termination by MCGM is unequal bargain and cannot be given effect in view of law laid down by the Apex Court in ***Indian Oil Corporation Limited Vs. Nilofer Siddiqui & Others.***²

9. Mr. Khandeparkar would further submit that so called pretext of policy formulated for allotment of Gymnasium Centres by the Municipal Corporation cannot be a reason for selectively throwing Appellant out of their premises. He would submit that the findings recorded by the City Civil Court for rejecting application for temporary injunction are unsustainable. There can be no presumption about legality of every action of Municipal Corporation under Section 144A of the Indian Evidence Act, 1872 as sought to be suggested in the order. He would dispute that possession of the premises is taken over by the Municipal

1 (2017) (2) Mh.L.J. 603

2 (2015) 16 SCC 125

Corporation by submitting that it only sealed one of the gates on the periphery of the ground. That the Gymnasium Centres are accessible from other gates and Appellants and its patrons are accessing the same and the Gymnasium is fully operational. He would submit that equipment of Appellants are still placed in the premises and therefore there is no question of possession of the premises being taken over by the Municipal Corporation. He would pray for setting aside the orders passed by the City Civil Court and for grant of injunction as prayed for in the Motions by the Appellants.

10. Mr. Anil Singh, the learned senior advocate would appear on behalf of the Respondent Municipal Corporation. He would submit that the Municipal Corporation has consciously not renewed the agreements with Appellants after 03.09.2020 on account of formulation of specific policy which envisages allotment of Gymnasium Centres and other public utility spaces by issuing advertisements and by inviting applications. That, when the proposal for renewing the agreements of Appellants was processed, it was decided not to sanction the same and instead, to go for allotment as per the policy. That thus there is a conscious decision on the part of Municipal Corporation not to renew the agreements. He would take me through various clauses of the agreement to submit that Appellants were appointed merely as caretakers of gymnasiums and possession thereof was never handed over to them. That, other two grounds of subletting of gymnasiums and unauthorised

construction therein are only supplementary and the main reason for seeking revocation is to go for allotment as per the new policy.

11. Mr. Singh would further submit that the subletting of the gymnasium centres is apparent from photographs which clearly show display of sign boards of 'AS Fitness Factory' at the premises. He would dispute the contention of the Appellants that 'A.S. Fitness Factory' is a trainer as trainer engaged by few patrons cannot be permitted by gym owner/operator to display such a large signboard. He would place reliance on receipts showing collection of fees from patrons by A.S. Fitness Factory. That, the Municipal Corporation conducted inspection of the premises on 21.06.2023 and found unauthorised constructions as well as operation of the gymnasium by AS. Fitness Factory. So far as the letter dated 26 April 2026 is concerned, he would submit that the same was issued based on inspection conducted on 31.01.2023. However in the subsequent inspection conducted on 21.06.2023, A.S. Fitness Factory was found to be operating gymnasium. That, *prima facie* material exists to draw inference that Appellants have sublet the premises to a third party. They have also erected unauthorised constructions. That therefore Municipal Corporation is justified in seeking back the premises from someone who is merely a caretaker.

12. Mr. Singh would draw distinction between the concepts of lease, license and caretaker and submit that caretaker does not have any semblance of right in the premises. He would rely upon Judgment of the

Apex Court in ***Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira & Ors***³ in this regard. Relying on the judgment in ***Mangal Amusement Park Private Limited & Anr. Vs. State of Madhya Pradesh & Ors.***⁴ Mr. Singh would contend that mere license does not create any stake or interest in the property in favour of the licensee.

13. So far as the objection of non-issuance of fresh show cause notice after issuance of letter dated 26 April 2023 to the complainant is concerned, Mr. Singh would contend that issuance of such notice is not required as the tenure of caretaker agreements have come to an end and the Municipal Corporation is in its right to eject a caretaker at any point of time without issuing any prior notice. Alternatively and without prejudice, he would submit that issuance of such a notice in the present case would be a mere useless formality as Appellants cannot continue to remain in the premises in absence of any agreement. He would rely upon judgment of the Apex Court in ***Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan***⁵ and of learned Single Judge of the Gauhati High Court in ***Jaydeep Goala Vs. State of Assam and Ors.***⁶ He would pray for dismissal of the Appeals.

14. Rival contentions of the parties now fall for my consideration.

3 (2012) 5 SCC 370

4 (2012) 11 SCC 713

5 (2000) 7 SCC 529

6 (2022) SCC Online Gau 252

15. Present Appeals raise challenge to order dated 4 October 2023 passed by the City Civil Court refusing grant of temporary injunction in favour of the Appellants. It must be observed at the very outset that the manner in which the learned Judge of the City Civil Court has approached the matter is not very convincing. The learned Judge ought to have confined the consideration to issue whether Plaintiffs had made out any *prima facie* case for seeking continuation in the premises. However, perusal of findings recorded in paras 17 and 18 by the learned Judge would indicate that he has presumed the impugned revocation letter dated 13.07.2023 to be orders passed under Section 105B of Mumbai Municipal Corporation Act 1888 (**Act of 1988**). It would be necessary to reproduce the findings of the learned Judge in para 17 and 18 as under:-

17. In my considered view the present case falls under the category of Clauses (1) and (2) of the principal laid down by the Hon'ble Apex Court and not under category of (3). On perusal of the provision of the act against the eviction order of Corporation premises the appeal is admittedly provided under Section 105-F of the MMC Act before the Hon'ble Principal Judge, City Civil Court, Gr. Mumbai whose decision shall be final and shall not be called in question in any original suit, application or execution proceeding as per 105G of MMC Act.

18. Thus, the plaintiff had statutory right of appeal before the Competent Forum which the plaintiff has not assailed on the ground of nullity of action. It is contention of the Ld. Advocate for plaintiff that right of personal hearing is not given as required under the law. As per Clause 35 of agreement in cases of disputes, the same shall be referred to Deputy Commissioner Zone-IV, but it is not referred to towards them. Further, the opportunity of personal hearing is not given as per mandate of law. In my view, the said grounds can be raised before the appellate court.

16. Perusal of the revocation letters dated 13.07.2023 do not indicate that they are issued by the Municipal Corporation in exercise of power under Section 105B of the Act of 1988. The revocation letters do not refer to any statutory provisions, under which they are issued. Chapter V-A of the Act of 1888 deals with power of the Municipal Corporation to evict a person from Corporation premises. Section 105B empowers the Municipal Commissioner to issue a notice to any person who is found to be in unauthorised occupation of municipal premises calling him/her upon to vacate the premises within one month from the date of service of notice. Sub Section (2) of Section 105B contemplates issuance of show cause notice before passing an order of eviction under Sub Section (1). Section 105B is reproduced thus:

105B. Power to evict person from Corporation premises

(1) Where the Commissioner is satisfied —

(a) that the person authorised to occupy any corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,

(i) not paid for a period of more than two months, [the rent, taxes, fees or compensation] lawfully due from him in respect of such premises; or

(ii) sublet, the whole or any part of such premises; or

(iii) committed, or is committing, such acts of waste as are likely to diminish materially the value, or impair substantially the utility, of the premises; or

(iv) otherwise acted in contravention of any of the terms, express or implied, under which he is authorised to occupy such premises;

(b) that any person is in unauthorised occupation of any corporation premises;

(c) that any corporation premises in the occupation of any person are required by the corporation in the public interest,

the Commissioner may notwithstanding anything contained in any law for the time being in force, by notice (served by post, or by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be provided for by regulations), order that that person, as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice.

(2) Before an order under sub-section (1) is made against any person, the Commissioner shall issue, in the manner hereinafter provided, a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

The notice shall,—

(a) specify the grounds on which the order of eviction is proposed to be made,

and

(b) require all persons concerned, that is to say, all persons who are or may be in occupation of, or claim interest in, the corporation premises, to show cause against the proposed order, on or before such date as is specified in the notice.

If such person makes an application to the Commissioner for the extension of the period specified in the notice, the Commissioner may grant the same on such terms as to payment and recovery of the amount claimed in the notice, as he deems fit.

Any written statement put in by any person and documents produced, in pursuance of the notice, shall be filed with the record of the case, and such person shall be entitled to appear before the Commissioner by advocate, attorney or pleader.

The notice to be served under this sub-section shall be served in the manner provided for the service of a notice under sub-section (1); and thereupon, the notice shall be deemed to have been duly given to all persons concerned.

3) If any person refuses or fails to comply with an order made under sub-section (1), the Commissioner may evict that person and any other person who obstructs him and take possession of the premises; and may for that purpose use such force as may be necessary.

(4) The Commissioner may, after giving fourteen clear days' notice to the person from whom possession of the corporation premises has been taken under sub-section (3) and after publishing such notice in the Official

Gazette and in at least one newspaper circulating in the locality, remove or cause to be removed, or dispose of by public auction any property remaining on such premises. Such notice shall be served in the manner provided for the service of a notice under sub-section (1).

(5) Where the property is sold under sub-section (4), the sale proceeds shall, after deducting the expenses of sale, be paid to such person or persons as may appear to the Commissioner to be entitled to the same:

Provided that, where the Commissioner is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he shall refer such dispute to a civil court of competent jurisdiction, and the decision of the court thereon shall be final.

(6) If a person, who has been ordered to vacate any premises under sub-clause (i) or (iv) of clause (a) of sub-section (1), within one month of the date of service of the notice, or such longer time as the Commissioner may allow, pays to the Commissioner the rent and taxes in arrears, or as the case may be, carries out or otherwise complies with the terms contravened by him to the satisfaction of the Commissioner, the Commissioner shall on such terms, if any (including the payment of any sum by way of damages or compensation for the contravention aforesaid, in lieu of evicting such person under sub-section (2), cancel his order made under sub-section (1); and thereupon such person shall continue to hold the premises on the same terms on which he held them immediately before such notice was served on him.

17. In the present case, it is not the case of Municipal Corporation that it has exercised powers under Section 105B or that it issued any notice under sub-section (2) to the Appellants or an order under sub section (1) thereof has been passed. The learned Judge of the City Civil Court has however presumed that the impugned revocation letters are issued under Section 105B and has further proceeded to hold that an appeal against such revocation letters could be filed under Section 105F. By recording these findings, the learned Judge had held that the grounds raised in the Suit can be raised before the Appellate Court. I find these findings of the

learned Judge of the City Civil Court in paras 17 and 18 of the order to be totally unsustainable.

18. The learned Judge thereafter proceeded to hold in para 21 of the order that there is a presumption of legality in action of public authority under Section 114 (e) of the Indian Evidence Act. The findings in para 21 of the order read thus:

21 However, as per Section 114-E of India Evidence act, the action of the public authority can be presumed to have been followed in accordance with law. There is no grudge against the plaintiff to file the false affidavit and photographs by the defendant. It can therefore safely be said that in pursuance of revocation letter, the defendant/ Corporation has taken possession of the suit premises. So the suit as well as the notice of motion become infectious and injunction in such event cannot be granted. There is breach of condition Nos. 20, 21 and 31 as the plaintiff created third party right without permission of the defendant/Corporation. The show cause notice was issued and the revocation order is passed. Therefore, I do not find any illegality or nullity in issuing notice and passing order. There is no malice intention on the part of defendant. So, it is not nullity of action as argued by the advocate for plaintiff.

19. Here again, the observations of the learned Judge in para 21 appear to be erroneous. The presumption under Section 114(e) that “*judicial and official acts have been regularly performed*” would not mean that every action taken by a Municipal Corporation are presumed to be regularly or legally performed. If every action of the Municipal Corporation is presumed to be taken in accordance with law, no Suit or proceedings can be filed in respect of any orders passed or action taken by the Municipal Corporation.

20. The findings recorded by the learned Judge in Para 17, 18 and 21 suffer from such egregious errors that Mr. Singh has not even made an attempt to justify the same. I am therefore broadly not in agreement with the findings recorded by the learned Judge of the City Civil Court about revocation letters being issued under provisions of Section 105F of the Act of 1908 and presumption under Section 114(e) of the Indian Evidence Act.

21. The learned Judge has thereafter proceeded to hold that the action has been taken after following due process of law and that therefore injunction cannot be granted. It is further held that the agreements with the Appellants have expired on account of its non-continuation. It has further proceeded to hold that the possession of the suit premises is taken over by the Municipal Corporation, which according to the learned Judge rendered both Suits as well as Notice of Motion infructuous. It has further been held that Appellants have created third party rights without permission of the Municipal Corporation. I now proceed to examine the correctness of these findings.

22. The entire dispute started with issuance of show cause notices dated 7 November 2022 alleging that the Appellants had sublet the gymnasium centre to third parties. Those show cause notices were issued apparently on the basis of a complaint raised by Mr. Asif Sayyed during the course of meeting that the Guardian Minister on 2nd November 2022. The Appellants have also placed on record previous

complaint dated 22.10.2019 of Mr. Asif Sayyed which levelled allegations of misutilization of funds for carrying out work at both the gymnasium centres. After receipt of the notices dated 07.11.2022, both Appellants denied operation of gymnasium centre by third parties and assured that they would follow conditions prescribed by Municipal Corporation without any breach. It appears that the officials of the Municipal Corporation paid visit to the gymnasium centres on 21.01.2023 and based on observations made during that visit, reply dated 26th April 2023 was issued to Mr. Asif Sayyed stating that Appellants were found to be operating the gymnasium centres. It appears that Mr. Asif Sayyed addressed complaint dated 20.06.2023 alleging that there was no further agreement in favour of Appellants. He alleged that the gymnasium no.1 is operated by A.S. Fitness Factory. He produced pictures as well as print out of website of A.S. Fitness Factory as well as fee receipts received by it to patrons to substantiate his allegations. The officials of the Municipal Corporation conducted one more site visit on 21.06.2023 and observed certain unauthorised constructions at the centres. They also observed the signboard A.S. Fitness Factory at the premises and also noticed presence of staff of A.S. Fitness Factory. A file note was prepared on 26.06.2023 by the Assistant Engineer proposing revocation of permission of Samantawadi Mahila Vikas foundation to run gymnasium no.1 and to invite applications from trusts for running gymnasium as per Policy Guidelines vide circular dated 29.01.2021. The proposal was sanctioned by various hierarchal officers

up to Deputy Municipal Commissioner-Zone IV. Accordingly, revocation letters dated 13.07.2023 were issued to both the Appellants.

23. Mr. Khandeparkar has strenuously contended that the revocation letters are without any show cause notice. He appears to be right in contending so as earlier show cause notices dated 07.11.2022 had lost their significance on account of issuance of letter dated 26 April 2023 to the complainant recording satisfaction about operation of the gymnasium centres by Appellants. Thereafter no further show cause notice was issued, even though, some observations were recorded by the Municipal Officials during the course of site visit conducted on 21.06.2023. The revocation letters refer to show cause notices dated 07.11.2022 and Appellants' reply dated 14.11.2022. In my view show cause notices dated 7.11.2022 cannot be connected to the revocation letters dated 13.07.2023. Furthermore, the show cause notices dated 7.11.2022 only allege unauthorised subletting. The other two grounds of expiry of authorization and erection of unauthorised constructions were not included in those show cause notices dated 07.11.2022. The allegation of subletting was found to be factually incorrect by the Municipal Corporation itself and reply to that effect was addressed to the complainant on 26.04.2023. I therefore hold that show cause notices were not issued to Appellants before issuing revocation letters dated 13.07.2023. The next issue is what would be the effect of non-issuance of show cause notices before revoking the permission for use of

gymnasium centres. This issue is answered in latter portion of the Judgement.

24. Before I proceed to examine the main ground of expiration of authorisation and existence/absence of right to continue use of premises, it would be appropriate first deal with two minor issues of unauthorised construction and taking over possession. Revocation letters alleged erection of unauthorised construction in the premises. Admittedly this allegation is without any show cause notice and without grant of any opportunity of giving explanation by the Appellants. Appellants allege that the Municipal Corporation itself has carried out certain work on the terrace of the Gymnasium Centre and in that regard reliance is placed on complaint dated 22.10.2019 of Mr. Asif Sayyed wherein he had questioned execution of various works at gymnasium centre by spending corporation funds. Some Work orders issued by the Municipal Corporation are referred in that complaint. Thus there is debate as to who exactly has erected that construction. Considering the limited remit of inquiry, I do wish to delve deeper into the allegation of unauthorised construction, which can be considered at the time of trial of the suit.

25. Much has been said by the Municipal Corporation about taking over possession of the premises. In fact, alleged taking over possession is one of the main factors taken into consideration by the City Civil Court for rejecting temporary injunction. There is debate between Mr. Khandeparkar and Mr. Singh as to whether the possession of the

premises is indeed taken over or not. photographs have been placed on record by both the sides. The photographs produced by the Municipal Corporation as well as action taken report dated 15.09.2013 would indicate that the Municipal Corporation intended to seal both gymnasium centres and accordingly placed locks on the outer gates of the compound on 13.09.2023. Mr. Khandeparkar however submits that mere locking of one of the gates of the garden does not prevent entry into the gymnasium centres from other entry gates of the garden. Accordingly, he has placed on record photographs taken on 13 October 2023 showing patrons of Appellants using the gymnasium. According to Mr. Singh, such use despite sealing is totally unauthorised. In fact, it appears that the debate between the parties during the course of hearing of the present appeals on 13.10.2023 and 16.10.2023 about the Appellants using the gymnasium centres, resulted in official of the Municipal Corporation attempting to further put seals at various gates so as to prevent use of gymnasium centres. This action would clearly indicate that despite putting locks at one of the entry gates on 13.09.2023, Appellants continued to remain in possession of the gymnasium centres. After further sealing was brought on record by the Appellant by filing affidavit on 17 October 2023, Mr. Singh fairly ensured revocation of such precipitative action by removing everything that was put up at the site on 16.10.2023. Be that as it may. The Appellants have neither been physically evicted nor physical possession of the gymnasium centres has been taken over by the Municipal Corporation. To that extent again, the

findings of the City Civil Court in paras 20 and 21 of its order would be unsustainable.

26. The main thrust of Mr. Singh is on absence of right in favour of Appellants to continue to occupy the premises of Municipal Corporation. According to him, since no right exists, temporary injunction cannot be granted. He has taken me through various clauses of the agreements executed with the Appellant Samantawadi Mahila Vikas Foundation. It would be necessary to reproduce some of the clauses of the agreement.

And whereas the party of the second part has requested to the Dy. Municipal Commissioner (Zone IV) and to allow them to renew the said premises viz. Gymnasium-2 area adm. 279 sq. mtrs. For the period of 11 months from 2nd September 2020 of 1st august 2021 maintenance.

1. The Dy. Municipal Commissioner (Zone IV) hereby grants permission of the party of the second part to conduct the Gymnasium-1 constructed at Yusuf Meher All Recreation Ground, Gilbert Hill, Andheri (West), Mumbai-58 area admeasuring 279 sq. mtrs. for the period of 11 (eleven) months from 2 September 2020 day of 1st august for maintenance on caretaker basis.

3) The key of the said premises shall always remain with the Assistant Commissioner, K/West Ward of the party of the first part and the party of the second part shall get key for opening the said premises every working day from the Ward Office. K/West Ward after the closure of the said premises the key will have to handover to the Asstt. Commissioner KWest Ward of the party of the first part. The party of the second part shall keep the Gymnasium-1 open from 5.30 a.m. to 9.30 p.m.

8. *The party of the second part hereby agrees to pay the monthly compensation of Rs.1 (Rupee one only) to the party of the first part,) as say be fixed or increased by the Municipal authorities from time to time in advance on or before 10 day of every month. Legal charges Rs.5000 (Rupees five Thousand only) and Rs.1000 (Rupees One thousand only, as permission charges. The party of the second part hereby agrees to use and said premises as a Gymnasium-1 only.*

10.*The party of the second part shall not without previous consent in writing of the Dy. Municipal Commissioner (Zone IV) make any alteration or additions whether permanent or temporary nature in the said premises.*

12. *It is hereby agreed between the parties hereto that on expiry of the period of the permission or earlier revocation thereof, the party of the second part shall at their own cost remove all articles and things belong to them from the said premises at their own cost.*

27.*The party of the first part shall be entitled to revoke or withdraw the permission granted at any time without assigning any reason whatsoever.*

27. The covenants of agreements executed with Appellants leaves no manner of doubt that the premises of gymnasium centres are handed over to them on caretaker basis. Though the agreements provided that such handing over is for ‘*maintenance*’, it is difficult to digest that the Appellants are merely maintaining the gymnasiums. The Agreements also used the word ‘*to conduct*’. Therefore, Mr. Singh has rightly not laid emphasis on the word ‘*maintenance*’. However, he emphasises the words ‘*caretaker basis*’ and submits that the possession as well as keys of the premises always remained with the Municipal Corporation. The Agreement does provide for an arrangement under which, the Appellants

were supposed to collect keys everyday and hand over the same at the closing hours. It therefore cannot be stated that there is any 'allotment' of premises of gymnasium centres in favour of Appellants. They are only granted a sort of license to enter upon the premises, operate gymnasiums and hand back the keys to Municipal Corporation every day. The permissive use was granted virtually free of charge on compensation of Rupee 1 per month. The idea behind permitting social institutions to run gymnasiums appears to be providing gym facility to the members of the public free of cost. It is therefore difficult to believe that any right is created in favour of the Appellants on account of execution of agreements in their favour. This is not a leave and license agreement executed for commercial considerations, but merely permission to conduct gymnasium as per the terms and conditions provided in the agreement.

28. It appears that after the tenure of the last agreement expired on 03.09.2020, letters were submitted by Appellants for continuation of the agreements. Accordingly, a file noting was prepared by Assistant Engineer (Maintenance) K/W Ward on 12.02.2021 seeking approval of the Assistant Commissioner and Joint Municipal Commissioner for extension of agreement with the Appellants on usual terms and conditions for the period from 4th September 2020 to 3 August 2021. The proposal was apparently approved till Assistant Commissioner, K/West. However when the same reached Joint Municipal Corporation, he made following remark on the proposal

‘check new circular policy of allotment and put up accordingly and discuss’.

29. The above remark was made apparently on the basis of Circular dated 29.1.2021 issued by the Assistant Commissioner (Estate) circulating Resolution No. 172 of Improvement Committee in meeting held on 20.2.2020 and of General Body on 24.11.2020. Mr. Singh has placed on record copy of the said Circular dated 29.01.2021 and according to him, the suit premises fall within category-2 which covers social welfare centres constructed through funds of MP/MLA/ Conciliar on municipal land. Under the policy, it is decided to make allotment after publishing advertisements in newspapers. The said decision is taken in view of orders passed by this Court on 24.02.2020 in Writ Petition no. 2584 of 2018.

30. Thus, the Municipal Corporation suspended process of execution of fresh agreement with Appellant after 3 September 2020 on account of issuance of circular dated 29.01.2001. This is why fresh agreement have not been executed with the Appellants after 03.09.2020. In the light of this position, the question that arises is whether Appellants can claim any right to continue in the premises contrary to the conscious decision of the Municipal Corporation not to renew the agreements. Mr. Khandeparkar has attempted to demonstrate that other gymnasiums in the vicinity have been permitted to continue in absence of renewal of agreements. In my view however, the right of the Appellants to continue

to use premises cannot be determined on the basis of right to equality, but on the basis of the rights and obligations arising out of their own agreements. There cannot be equality in illegality and therefore merely because the Municipal Corporation has not yet sought premises from other gym operators in the vicinity despite expiry of tenure of agreements, the same cannot be a ground to claim parity. The Appellants were undoubtedly occupying Municipal Corporation's property on caretaker basis. Upon expiration of tenure of the agreements, no rights exist in them to demand continuation in the premises. It may happen in a given case that the Municipal Corporation may not immediately insist on taking over the premises on account of pending proposal for issuance of advertisement etc. In the present case, the File Note approved in June 2023 would leave no manner of doubt that the Municipal Corporation has decided to invite applications from various trusts for operation of gymnasium centres as per circular dated 29.01.2021. Once the Municipal Corporation decides to act on the Circular dated 29.01.2021, Appellants cannot insist that they must be permitted to continue in the premises and thereby frustrate the Corporation's proposals for inviting applications from other trusts. The only possible rights that the Appellant can have is to participate in the selection process as and when initiated by the Municipal Corporation.

31. As held by the Apex Court in *Maria Margarida Sequeira Fernandes (supra)*, caretaker cannot acquire any interest in the property

which he/ she is permitted to occupy gratuitously. The Apex Court has held in para 97 as under:-

97. Principles of law which emerge in this case are crystallised as under:
- (1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or 9 decades such person would not acquire any right or interest in the said property.
 - (2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
 - (3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
 - (4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.
 - (5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

32. In *Mangal Amusement Park Private* (supra), the Apex Court has referred to its judgment in *Associated Hotels of India Ltd. Vs. R.N. Kapoor* and has held as under:

16. The issue concerning the distinction between lease and licence came up for consideration before this Court in *Associated Hotels of India Ltd. v. R.N. Kapoor*. In para 27 of his judgment, Subba Rao, J. (as he then was) observed therein as follows with respect to lease: (AIR p. 1269)

"27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor."

Thereafter, the learned Judge referred to the definition of "licence", then observed as follows: (R.N. Kapoor case, AIR p. 1269, para 27)

"27. ... Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred."

33. Following the sound exposition of law by the Apex Court in the above judgments, it is difficult to hold that any right exists in the Appellants to continue to remain in the premises. Mr. Khandeparkar has sought to contend that since the occupation of Appellants in the premises is authorised, they cannot be evicted therefrom without following due process of law. He has relied upon the use of words 'permission for use of Gymnasium Centre no.1 is revoked and possession of property i.e. Gymnasium Centre no.1 will be taken over by BMC'. On the basis of this statement in the revocation letter, Mr. Khandeparkar has attempted to suggest that Appellants 'possess' the premises, they were 'permitted' to do so and that the 'permission' was revoked for the first time on 13.07.2020. He has relied upon judgment of Division Bench of this Court in **Balvant Thakkar (supra)** In which this Court held in paras 14, 17 and 18 as under:

14. The term 'unauthorized occupation' within the meaning of section 105-A(d) of MMC Act, not only covers persons in occupation of corporation property without authority but also includes persons who continue to occupy the premises after the authority under which he

occupied the premises has expired or has been determined. In the instant case, the Corporation had inducted the petitioners in the said shops with due process of law. Thus the occupation of the premises at its very commencement was under authority, but such authority has since expired and the petitioners continued to be in possession of the Corporation premises even after the expiry of the authority. The petitioners are therefore in unauthorized occupation of the Corporation premises, which are abutting the subway/public street.

17. In this regard it is pertinent to note that Chapter 5-A of the Bombay Municipal Corporation Act confers powers on the Municipal Commissioner to evict persons from the Corporation premises. Clause (b) of sub-section (1) of section 105-B enables the Commissioner to evict a person in unauthorised possession of Corporation premises where as clause (c) enables the Commissioner to recover possession of the corporation premises if required by the corporation in the public interest. Sub-section (2) of 105-B prescribes the procedure expected to be followed for exercising such power.

18. In the instant case the Corporation has sought to evict the petitioners, who are in possession of the premises for a period of over 10 years, without taking recourse to the remedy available under the statute and without following due process of law. The action of the Corporation, a statutory body, is not in consonance with the procedure prescribed by the statute. The action of the Corporation being arbitrary, in violation of principles of natural justice and contrary to the statutory provisions, the petitioners were justified in invoking the writ jurisdiction of this Court.

34. However, the facts in *Balwant Chatrabhuj Thakkar* are clearly distinguishable. In that case, a shop was allotted in favour of the Respondent therein by execution of leave and license agreement for block period of 10 years and 5 years. The allotment was on commercial terms. In the present case, there is neither any 'allotment' nor there is any commercial arrangement between the parties. Appellants operate the gymnasiums on caretaker basis virtually without any consideration. Agreements suggest that possession of the premises would always

remain with the Municipal Corporation. The tenure of their caretaker agreements have expired. Therefore there is no need to follow procedure under Section 105B for recovery of possession from Appellants.

35. Mr. Khandeparkar also relied upon the Apex Court decision in ***Indian Oil Corporation (supra)*** in which the Apex court has referred to its Judgment in ***Central Inland Water Transport Corporation. Ltd. Vs. Brojo Nath Ganguly*** (1974) 4 SCC 696. However, it is difficult to invoke the principles in ***Central Inland Water Transport Corporation*** in the present case. The Corporation has merely permitted use of the premises without any commercial terms on caretaker basis. Therefore, there is no question of unequal bargain between the parties. Therefore, reliance of Mr. Khandeparkar in Judgment in ***Indian Oil Corporation*** would not assist his case.

36. After considering the entire conspectus of the case, I am of the view that no right exists in Appellants to remain in possession of the property of the Municipal Corporation. Their caretaker agreements have come to an end in September 2022. The Municipal Corporation has taken decision to invite applications from other institutions for operating the gymnasiums in the premises. Appellants can participate in the said process. However, they cannot prevent the Municipal Corporation from conducting selection process by insisting that they alone would continue to occupy the premises for indefinite period of time.

37. Having held that the Appellants do not have any enforceable rights to continue to occupy the premises, the issue of failure to issue show

cause notices before issuance of revocation letters, left unanswered above, can now be taken for determination. Mr. Singh has relied upon the Judgment of Apex Court in *Aligarh Muslim University (supra)* in which the Apex Court has discussed ‘useless formality theory’ and has held in para 20 to 26 as under:

20. This is the crucial point in this case. As already stated under Point 4, in the case of Mr Mansoor Ali Khan, notice calling for an explanation had not been issued under Rule 5(8)(i) of the 1969 Rules. Question is whether interference is not called for in the special circumstances of the case.

21. As pointed recently in *M.C. Mehta v. Union of India* there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in *Gadde Venkateswara Rao v. Govt. of A.P.*? it is not necessary to quash the order merely because of violation of principles of natural justice.

22. In *M.C. Mehta* it was pointed out that at one time, it was held in *Ridge v. Baldwin* that breach of principles of natural justice was in itself treated as prejudice and that no other “de facto” prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In *S.L. Kapoor v. Jagmohan Chinnappa Reddy, J.* followed *Ridge v. Baldwin*? and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in *S.L. Kapoor* case laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K.L. Tripathi v. State*

Bank of India Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., Pp. 472-75), as follows: (SCC p. 58, para 31)

"[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S.K. Sharma*'. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P.*?

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in *M.C. Mehta*' referred to above. This Court Surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Staughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue.

Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in *S.L. Kapoor v. Jagmohan*, namely, that on the admitted or indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr Mansoor Ali Khan though notice has not been issued.

38. The law is thus well settled that principles of natural justice cannot be overstretched to make mockery out of it. In the present case, the Municipal Corporation wants to seek back the premises essentially on account of expiration of tenure of caretaker agreements. For such action, it is incomprehensible as to why show cause notice is required and what possible defence can be raised by Appellants. Appellants do not have any right to continue to occupy the premises after expiration of tenure of their caretaker agreements, and therefore no purpose would be served in directing the Municipal Corporation to issue fresh show cause notices for grant of opportunity of hearing to the Appellants in respect of allegations of subletting and erection of unauthorised construction. Even if the said two allegations are ignored, the Municipal Corporation still has right to revoke permission (which has anyways expired) and take back possession of the Municipal of the suit premises.

39. I am therefore of the view that the Appellants do not have any *prima facie* case for grant of temporary injunction in their favour. Though I do not fully agree with reasons recorded by the City Civil Court for refusal of temporary injunction, I do agree with its final conclusion that temporary injunction needs to be refused in the facts and circumstances of the present case.

40. I therefore find both the appeals to be devoid of merits warranting dismissal. However, considering the fact that the Appellants have been occupying the premises and conducting gymnasium centres therein, some time can be granted to them for vacation of the premises. The

Appellants shall accordingly vacate the premises within a period of 8 weeks from today. Beyond this, no further protection can be granted in favour of the Appellants. It is also clarified that the City Civil Court shall not be influenced by the findings recorded in this judgment while deciding the suit finally.

41. Both the Appeals are accordingly dismissed. There shall be no order as to costs.

SANDEEP V. MARNE, J