

suresh

904-WPLOO-3962.2018.doc

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

WRIT PETITION {LODGING} NO.3962 OF 2018

1. Venkat A. Bhasha Boina
2. Sajanlal R. Jaiswal
3. Sudhi Narayan Potphade
4. Sudesh Narayan Porphede
5. Omprakash Gupta Petitioners

Vs.

1. Mumbai Municipal Corporation
2. Assistant Commissioner, "S" Ward Respondents

Mr. Mukesh M. Vashi, Senior Advocate, with
Ms Aparna Devkar i/by M.P. Vashi & Associates
for the Petitioners.

Mr. A.Y. Sakhare, Senior Advocate, with
Mr. Ashwin Sakolkar & Ms Rupali Adhate for the
Respondent-MCGM.

Mr. Vilas Dagale, Senior Inspector of Licence &
Mr. Kedar Hardikar, Inspector of Licence, "S"
Ward, present.

Mr. N.H. Luman, A.E., Market, present.

CORAM: S.C. DHARMADHIKARI &
G.S. PATEL, JJ.

DATE : OCTOBER 11, 2019

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. By this writ petition under Article 226 of the
Constitution of India, the petitioners are challenging the action
of the Mumbai Municipal Corporation.

2. The MMC has taken a firm stand that the stalls of

suresh

904-WPLOO-3962.2018.doc

certain vendors affecting the smooth flow of traffic at a busy road need to be removed.

3. A detailed order has been passed, copy of which is at page 162 (Exhibit Q-1) of the paper-book, invoking Section 314 of The Mumbai Municipal Corporation Act, 1888 (“**MMC Act**”). This order reads as under:-

*“MUNICIPAL CORPORATION OF GREATER MUMBAI
No.ACS/OD/536/LICENCE dtd. 14.11.2018*

*Office of Assistant Commissioner
S Ward Licence Department,
Room No.301, 3rd Floor,
S Ward Office Building,
L.B.S. Road, Near Mangatram
Petrol Pump, Bhandup (west),
Mumbai – 400 078.*

To,
Mr. Ramchandra Tukaram Waghmare
Squatter, Stall Licence No.795303331
Sant Shiromani Namdeo Maharaj Marg,
i.e. Station Road, Bhandup (west),
Mumbai – 400 078.

Sub: *Hearing arranged as per Hon’ble High Court Bombay’s orders in Writ Petition No.3149/2018 dt. 05-10-2018*

Ref: 1) *Allotments Letter U/No.AC/MKT/-/ AEM dt. - issued by A.C. (Market) of M.C.G.M. or JPD/R&R/MUIP/43 dt. 25.01.2008 issued by M.M.R.D.A.*

2) *Letter for third hearing U/No.ACS/OD/170/Lic. dt. 28.08.2018*

Hon’ble High Court Bombay in writ petition no.3149/2018 on 05.10.2018 has passed an order to issue fresh notice for hearing accordingly a fresh notice is issued under no.ACS/OD/430/Licence dt. 16.10.2018 with the directions issued by the division bench of



suresh

904-WPLOO-3962.2018.doc

Hon'ble High Court Bombay (Coram: B.R. Gavai and M.S. Karnik J.J.) in writ petition no.652 of 2017. Reply to the said notice is filed through M/s. M.P. Vashi and Associates to the said fresh notice on 29.10.2018.

As per Hon'ble High Court order passed on 05.10.2018 and direction given by the Hon'ble Court a hearing was arranged before Asst. Commissioner `S` Ward on 02.11.2018 when Advocate Mr. Makarand M. Kale representative of M/s. M.P. Vashi and Associate is present and submitted grievance as under that:-

1) under what provision of law and Act the notice was issued has not been mentioned in the said notice. Further if it has issued under section 314 of M.M.C. ACT 1888 the same can be issued by Municipal Commissioner only.

2) The Licencee were issued licence under section 313 of said Municipal Act and paying rent for the same.

3) Copy of judgment of Writ Petition No.224 of 2011 is attached from page 13 to 38 of representation submitted at the time of hearing and as per point no.1 of said order, licencee is protected and shall not be evicted and relocated.

4) Please refer Page 39 of written submission which is the starting of copy of judgment of Azad Hawkers Union and other, the relevant point is at para 46 in view of judgment of division bench of this court in Vile Parle Kelvani Mandal (Supra), all such vendors existing on 01.05.2014, are entitled to protection against eviction.

5) Please refer Page 80 of written submission which is the copy of order of judgment of Azads Hawkers Union and others point no.XII operative Para, State that – no hawking would be permitted within 100 Meters from any place of Worship, Holy Shine, Educational Institutions and Hospitals or within 150 Meters from any Municipal or other Markets or from any Railway Station. However, no survey is conducted regarding verifying the distance in respect of Restricted Zone.

6) Please consider the point of various Judgment Page 82, 87, 93 Para II of written submission.

suresh

904-WPLOO-3962.2018.doc

7) Please refer Page 96 of written submission where in it is stated that – Advocate Mr Makarand Kale was present for hearing on 27.09.2016 but concern officer was not available to take hearing.

8) Copy of photograph of one of the gala's is attached at page 99 of written submission which clearly shows that the structure is not suitable for carrying on the business smoothly.

9) As per statement para 5 licensee stall falls in Hawking Zone hence the notice given is bad and illegal. Further "The protection of Livelihood and Regulation of street vending Act 2014" is the Central Act and M.M.C. Act is the State Act, hence the Central Act always supersede the state Act.

10) As per statement para no.7, the judgment of the division bench has confirmed that street vendors existing as on 1 May 2014 are entitled to protection against eviction.

11) As per statement point no.11 at page no.5 there is no Municipal Market situated within 150 meters from the place of business of licensee. If any survey or measurement is done please furnish copy of same. The licensee denies that his place of business is situated within 100 Meters from place of Worship, Holy shine or Educational Institution. Therefore, on the basis of vague notice licensee cannot be evicted.

12) It is assume that the direction given by the Division Bench in case of Azad Hawkers Union would not be applied to licensee, as our client business was in existence much prior to the construction of place of worship and holy shine i.e. Gurudwara or and Educational Institution.

13) In the interest of justice notice is to be withdrawn.

The above point of written submission is considered, however, the brief reasoning is as under:-

As per Hon'ble High Court order in W.P. 652/2017 it is clearly stated that "It is further directed that in view of



suresh

904-WPLOO-3962.2018.doc

the direction issued by the Hon'ble Supreme Court in 2004 Ekta Judgment, which is duly reiterated by the Hon'ble Supreme Court in 2009 Ekta Judgment, no hawking would be permitted within 100 meters from any place of worship, holy shrine, educational institutions and hospitals or within 150 meters from any Municipal or other Markets or from any railway station. It is also directed that no hawking would be permitted on footbridge and overbridges".

As the licensee's Squatter stall is in preview of under section 313 of MMC Act 1888 and notice itself clearly state that the violations are as per orders of Hon'ble High Court of Bombay in Writ Petition No.652/2017. Again, section 314 of M.M.C. Act clearly emphasise that the power to remove without notice anything erected, deposited or hawked in contravention of section 312, 313 or 313A. Hence, quoting section in the said notice is irrelevant.

Licensee are paying licence renewal fees and not rent or compensation for their respective squatter stall. As they are erected on Municipal footpath u/s 313A/313B of M.M.C. Act, 1888. The Station road (Shri Sant Siromani Maharaj Road) is non-hawking zone, because no hawking is permitted within 100 meter from any place of worship, holy shrine, education institution.

As per High Court order in Writ Petition No.652/2017 point No.(IX) of said order read as under' "After coming of the said Act there are no non-hawking zones and that the hawkers are entitled to carry on their vending activities on all road in cities is rejected".

As per your written submission, you have stated that all the vendors who are existing as on 01.05.2014 are entitled to protection against eviction, however, the said judgment can not be applicable here as the Hon'ble High Court of Bombay in Writ Petition 652/2017 has directed, in view of direction given by Hon'ble Supreme Court in 2004 which is duly reiterated by Hon'ble Supreme Court in 2009 Ekta Judgment, no hawking would be permitted within 100 meters from any place of worship, holy shrine, educational institutions and hospitals or within 150 meters from any Municipal or other Markets or from any railway station. It is also

suresh

904-WPLOO-3962.2018.doc

directed that no hawking would be permitted on footbridge and overbridges.

As per the order of judgment in writ petition no.652/2017 street vendors who are existing on or before 1st May 2014 are not entitle for protection against eviction. As your stall/squatter falls within 100 meters from the place of worship, holy shrine i.e. Gurudwara – Sri Guru Singh Sabha, educational institution i.e. Gurunanak English High School and Junior College, hence it is binding upon you to shift to the permanent alternate accommodation offered to you vide above reference (1) which is on the same road irrespective of old or new, this is applicable to all the hawkers.

Further your Squatter stall is hindrance to the pedestrian, School Kids, Busy Vehicular traffic of B.E.S.T. Buses, Rickshaws which are entering towards Railway station and Public on the road going from and coming to Bhandup Railway station and L.B.S. Road.

Also, you have already been informed to take possession of the permanent alternate accommodation offered to you vide above reference (1), but you have not yet shifted to the said permanent alternate accommodation even though it is just behind your present reserved area, on the same road.

Hence in the interest of the public at large and to implement Hon'ble Supreme Court order, I pass following order.

ORDER

I hereby direct you that, you shall remove all your belongings and vacate the stall within fifteen days and immediately shift to the shop which was already allotted to you in the M.M.R.D.A./Municipal Market premises, failing which M.C.G.M. will remove it at your risk and cost as your squatter stall is within 100 Meters from the place of worship, holy shrine i.e. Gurudwara – Sri Guru Singh Sabha, educational institution i.e. Gurunanak English High School and Junior College which clearly violets the Hon'ble High Court Writ Petition No.652/2017.

Sd/-
Asstt. Commissioner 'S' Ward"

suresh

904-WPLOO-3962.2018.doc

4. On such an order being passed and the record being brought to our notice, we had indicated to the parties and particularly the petitioners that these matters have a limited scope of judicial review. In other words, in writ jurisdiction we can interfere only if the municipal action is utterly perverse or arbitrary, unreasonable and unfair, particularly when it purports to address larger public interest.

5. On 23-7-2019 as also in a subsequent hearing, we had the benefit of not only the arguments of learned Senior Counsel Mr. M.M. Vashi but also Mr. A.Y. Sakhare. In the first instance we were informed that, the petitioners are within the prohibited distance. They are very near or close to a railway station and an educational institution. Mr. Vashi, however, disputed this position and sought to contend that the stalls are not within 100 metres of the railway station (Bhandup railway station). They may be in close proximity with an educational institution but when a sketch map was tendered and relied upon during the course of arguments before this Court, it would require a response from the Municipal Corporation. The Municipal Corporation was firm and reiterated its stand that the stalls are within 100 metres of Bhandup railway station. Therefore, we allowed an affidavit in reply to be filed. On 7-8-2019, that affidavit in reply was filed to which a rejoinder also has been tendered and taken on record.

suresh

904-WPLOO-3962.2018.doc

6. On 16-9-2019, a detailed order was passed on this petition and that would read as under:-

"1. An affidavit in reply has filed today, a copy of which is served on the Advocates for the petitioners.

2. We drew the attention of Mr Vashi, learned Senior Counsel for the Petitioners, to two specific statements in the affidavit in reply tendered today, one of which in clearest terms says that the petitioners are hawkers situated at Shri Sant Shiromani Maharaj Marg/Station Road which is admittedly a road leading from Lal Bahadur Shastri Marg to the Bhandup Railway Station. Also on this station road are a municipal market, a market of the Mumbai Metropolitan Regional Development Authority, the Sri Guru Singh Sabah Gurudwara (Holy Shrine), and the Gurunanak English high School and Junior College (educational institution. The stalls of the petitioners are within 150 mtrs of Bhandup Railway Station or within 100 mtrs of the Sri Singh Sabah Gurudwara or within 100 mtrs of the educational institution, and which is in 'no hawking zone'.

3. The Municipal Corporation affidavit asserts that it is incorrect to say that the petitioners are not on the footpath. Equally incorrect is the assertion that the petitioners are not causing obstruction to the pedestrians. There is very heavy traffic, pedestrian and vehicular, on this road. Passengers use it to access the station, and vehicles have to stop for a drop-off and a pick-up. The petitioners are blocking proper access to the station.

4. The Municipal Corporation also denies the petitioners' earlier contention that there are other hawkers right outside the entrance of the Sri Guru Singh Sahab Gurudwara and Gurunanak English high School and Junior College and on the footpath, and that no action is being taken against them. The Municipal Corporation affidavit says in paragraph 13 that there are several shops adjacent to the entrance of Gurunanak

suresh

904-WPLOO-3962.2018.doc

Gurudwara and Gurunanak School, but none of these shops is on the footpath. All these shops are situated on private property for which the shop owners pay property taxes. These are, therefore, not comparable instances. The petitioners are termed as encroachers. Such encroachers and hawkers, even if lawfully carrying on business, have to be re-located so as to remove the obstruction on the footpath/pavement and to allow the free flow of pedestrian and vehicular traffic on the road.

5. *The affidavit also says in clearest terms that the petitioners are allottees of shops in the municipal market. The petitioners were offered these shops much prior to the institution of this petition. The present area of the petitioners is 2 mtr x 1 mtr (2 sq mts or 18 sq ft), whereas the allotted shops in the Municipal market have a minimum area of approximately 2 mtrs x 2 mtrs (4 sq mts or about 36 sq ft). This is, therefore, double the area of the existing hawkers' stalls.*

6. *We direct the petitioners to tell us in clear terms by 19th September 2019 as to whether they are accepting the allotments in their names of the shops in the municipal market. We have also clarified to Mr Vashi that in our limited jurisdiction we would not allow any disputed issue or disputed question of fact to be raised.*

7. *Mr Vashi says that he would speak to each of the petitioners and explain to them the consequences of the statements in the affidavit and take instructions whether the allotments can be accepted by them without prejudice or whether the petitioners desire to forego or forfeit the allotment and maintain this petition.*

8. *List the matter on 19th September 2019.*

9. *The ad-interim relief granted earlier will continue to operate till 23rd September 2019."*

7. We had indicated to Mr. Vashi that, in terms of the affidavits of the Municipal Corporation and the instructions

suresh

904-WPLOO-3962.2018.doc

received by Mr. Sakhare, if there are vacant stalls which could be allotted to the petitioners so as to rehabilitate them and not deprive them of their source of livelihood, time was sought to take instructions. We repeatedly adjourned this matter, although we could have straightaway dictated a Judgment in open Court. That was to enable Mr. Vashi to take instructions and on one occasion Mr. Vashi reverted back by stating that, not all the stalls suit the requirement of the petitioners and some of them are not sufficient for carrying on even a small business. The movement is not possible and without causing inconvenience to the stall holders and the customers. It is in these circumstances and when such disputed issues were involved, that on one occasion a suggestion was given that the petitioners can withdraw from this petition, or some of the petitioners who do not wish to accept the offer of the Municipal Corporation can withdraw from this writ petition or the writ petition as a whole can be withdrawn so as to institute appropriate legal proceedings.

8. The petitioners are only buying time and we were informed, at least on two occasions prior to today, that the petitioners have yet to give instructions to the Advocate, either to withdraw from the proceedings or to withdraw the proceedings as a whole.

suresh

904-WPLOO-3962.2018.doc

9. Today also a request for adjournment is made on the very same ground but we declined it, for the Diwali festival is fast approaching and there are urgent matters every day before this Court including of students who are denied opportunity to take higher education. In the circumstances, we decline the request for adjournment.

10. The facts to be noted are very few and simple. There are about five petitioners before this Court who have stated that the orders impugned in this petition would affect their business or their right to carry on a business of their choice. They are contending before this Court that they are licenced stall holders. They are paying rent/compensation for their respective shops. Exhibits "B1" to "B5" are copies of the licences issued by the Municipal Corporation. It is then stated that some of the petitioners were issued notices by the Market Department of the Municipal Corporation and in those notices the allegations are that the shops of the petitioners require removal for widening of the road. The petitioners had earlier filed two Writ Petitions in which orders have been passed, initially not to evict the petitioners and later on to give a personal hearing. Thereafter, a personal hearing was given and today the allegations are that, there is a developer – HDIL Limited – who has constructed a Mall on the said road and the respondents are seeking to evict the petitioners from the stalls

suresh

904-WPLOO-3962.2018.doc

and shops which are not at all affecting the business of the Mall owner. The other thing that is alleged is that, the shops are situate on a gutter and for cleaning of the gutter or drain the petitioners are required to be removed. However, it is fairly stated that the attempt to evict the petitioners for cleaning the alleged drain or gutter was given up and that action was withdrawn. Thereupon, the prior Writ Petition also stood disposed of as withdrawn. An attempt has been made to contend that the Municipal Corporation has misused the liberty given by this Court to initiate fresh action should the occasion demand. Now the reference is to a Writ Petition which is third in line and says that the petitioners should not be removed for either widening of the road or to complete the levelling of an existing road. However, it is no longer an issue surviving for our consideration. The factual details disclosed up to para 13 of this petition are, therefore, not relevant nor the prior orders. These are not required to be further referred for the instant action.

11. The whole emphasis is that, there is a law now enacted, namely, The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. Reliance is placed on Section 3(3) of this Act to urge that street vendors are protected till a survey is carried out. Therefore, there is no right to evict, remove or shift the petitioners from their existing place.

suresh

904-WPLOO-3962.2018.doc

12. In support of that argument, reliance is placed on a Judgment and Order of this Court dated 3-5-2017 and the prior Order of 23-10-2015 disposing of a batch of petitions.

13. It is stated that the fresh notices are contrary to the orders and directions of this Court in the aforesaid Writ Petitions and further contravene the mandate of the Parliamentary statute. It is stated that the initial notices (Exhibits "N1" to "N5") came to be set aside in O.S. Writ Petition (Lodging) No.3149 of 2018 by this Court. However, it is conceded that the merits of the action were not discussed by this Court but liberty was given in terms of the order passed on 5-10-2018 in this petition to issue a fresh notice, the petitioners were given an opportunity to file reply whereafter a speaking order was directed to be passed. The show cause notices were, therefore, replied and later on the impugned orders have been passed.

14. After this Court took cognizance of the present petition and issued several directions, we have affidavits placed on record and it is necessary to refer to their contents.

15. One Vilas Dagle, Senior Inspector of Licence, 'S' Ward (an official of the Municipal Corporation) has filed an affidavit and that affidavit is affirmed on 7-8-2019. In the affidavit it is contended that the petitioners and other hawkers

suresh

904-WPLOO-3962.2018.doc

whose names are enlisted at Exhibit-A are members of an Association known as Bhandup Stall Owners' Association. Now that Association is neither a party to the petition nor it is disclosed in the memo of the writ petition as to how the five petitioners before this Court can represent all the hawkers. Further, there is no resolution as well.

16. Apart from this fact and objection, the writ petition is contested by denying that there is any connivance or collusion with the developer – HDIL Limited. There is no concern with the construction of a Mall by this entity and the Municipal Corporation is not acting at its behest. A bald and vague allegation is therefore denied. Then, it is contended that the petitioners are not being removed at the sweet-will of the respondents or at the whims and fancies of the officials of the Municipal Corporation. In fact, there is no question of removal but this is a relocation of the petitioners. They are being provided with alternate permanent premises in a Municipal Market situate on the same road. It is urged that the petitioners are presently engaged in hawking activities by erecting make-shift structures. Now, permanent and well constructed structures in the market situate on the very road are being provided. In fact, for a decade and more the petitioners are being requested to shift themselves. In para 9 of this affidavit, it is highlighted as to how the road is a very busy and congested

suresh

904-WPLOO-3962.2018.doc

and it is having a width of only 60 feet and this road leads to Bhandup railway station. There is a footpath on one side of the road and that is occupied by the petitioners. There is only a space of 8 metres between the road divider and the footpath, which is being used by both vehicles and pedestrians. The road has a heavy vehicular traffic. There is also a BEST bus stop. The public transport buses plying on the road have to halt at this bus stop so as to enable passengers to alight or to board the bus. The buses also have to ply throughout the day. There is heavy footfall of pedestrians and they use this road to access Bhandup railway station. It is the main arterial road which connects the station to the Lal Bahadur Shastri (“**LBS**”) road. The Municipal Corporation has said that owing to the activities of the petitioners and their occupation of the footpath, inconvenience is caused to the pedestrians and thus, for entering and exiting the station, there is little space to walk or to catch a public transport bus for further commuting. It is in these circumstances, when the goods and articles of the petitioners are placed outside their structures, to avoid mishaps and accidents, these persons need to be shifted. There is work of Metro Rail being carried out at the LBS road. That is resulting in more congestion and difficulties in vehicular and pedestrian movement.

17. It is stated that reliance on the Parliamentary statute



WWW.LIVELAW.IN

suresh

904-WPLOO-3962.2018.doc

is misplaced because the hawkers who are carrying on business prior to 1-5-2014 are not being evicted, as complained. In fact, the Judgment of the Hon'ble Supreme Court as also this Court reiterates the exception in the law that no hawking could be permitted ever, within 100 metres of any place of worship, holy shrines, educational institutions and hospitals and within 150 metres from any Municipal or other markets or from any railway station. If the road occupied by the petitioners for their hawking activities is known as station road and which commences from a traffic junction on the LBS road and then leads to Bhandup railway station, on the way there is a Municipal Market, Sri Guru Singh Sabah Gurudwara and Gurunanak English High School and Junior College, then all the more the shifting becomes necessary. It is, therefore, reiterated that the hawkers cannot continue their trading activities and block a busy road. All the more when 95 of them are on the road, of which 88, including the five petitioners, have approached this Court. Out of these 88 hawkers, 18 are within a distance of 150 metres from Bhandup railway station, 16 are within a distance of 150 metres from the Mumbai Metropolitan Region Development Authority ("**MMRDA**")/Municipal Market, 49 are within a distance of 100 metres from Sri Guru Singh Sabah Gurudwara and the MMRDA/Municipal Market and 5 are situate within a distance of 100 metres from Sri Guru Singh Sabah Gurudwara and an educational institution. It is in these

suresh

904-WPLOO-3962.2018.doc

circumstances that the public at large is inconvenienced by the presence of the petitioners at site.

18. The deponent of this affidavit also relies upon a communication of 22-2-2007/26-12-2007 as also certain photographs and a sketch map.

19. The petitioners filed a rejoinder affidavit and particularly after they orally contended before this Court, as reflected in this Court's previous order in the present petition, that the assertion of the Municipal Authorities is incorrect and erroneous. It is urged that the road on which the petitioners are situate, namely, Sant Shiromani Namdeo Maharaj Marg, has been declared/classified/identified as hawking zone. Hence, it is incorrect to allege that the petitioners are in a no hawking zone.

20. Then it is contended that the petitioners are protected by Judgments and Orders of this Court. The petitioners are alleging, in this rejoinder, that on the eve of these notices, a board displayed at the site declaring this road as hawking zone has been removed. Then it is stated that none of the petitioners are on the footpath. They are on the land behind the footpath. This is also evident from the fact that the petitioners also pay ground fee/tax to the Municipal Corporation of Greater Mumbai. This payment is reflected in the licence of the petitioners. Then it is alleged that there other shops/stalls

suresh

904-WPLOO-3962.2018.doc

which are within 150 metres from the railway station and they have not been served such notices. The petitioners are across the street or located opposite Gurunanak Gurudwara and Gurunanak School and are not situate on the footpath. They are not causing any obstruction to the movement of pedestrians. Then it is stated that the width of the road is not 16 metres but 24.4 metres as is evident from the information given by the Municipal Corporation on an application under The Right to Information Act, 2005.

21. Then it is claimed that right outside the entrance of the Gurunanak Gurudwara and the School there are several shops on the footpath. It is in such circumstances that the contents of the affidavit in reply are denied. The petitioners are again objecting to the presence of a builder and developer and who has allegedly influenced the Municipal Authorities to act against them. Thereafter, it is stated that the Market Department had allotted letters to only 34 licence holders and balance 54 licence holders were given allotment letters by the MMRDA. Now the Municipal Corporation of Greater Mumbai is assuming the power to allot alternate premises. Therefore, the allegation is that the petitioners do not know as to who owns the public market. It is stated that licenced stall holders like the petitioners cannot be removed. It is stated that the affidavit is contrary to the map annexed. There are no two footpaths but

suresh

904-WPLOO-3962.2018.doc

only one footpath. Thus, the Municipal Corporation is misleading this Court, is the allegation.

22. We have already referred to the order passed by this Court after such an affidavit in rejoinder was filed on 17-8-2019.

23. Since we were repeatedly told that the hawkers would be displaced, their only source of livelihood will be taken away in a highhanded manner, that they would be totally uprooted in life, we gave one more opportunity and to be on the safe side we called for an additional affidavit from the Municipal Corporation. At pages 710-719 of the paper-book is the additional affidavit in reply. Now in that additional affidavit in reply/sur-rejoinder, the Municipal Corporation is contending that the petitioners have made contrary and contradictory statements in the memo of the writ petition and their rejoinder affidavit. Moreover, there is a clear admission of these licenced hawkers occupying the footpath, for the allegation in the rejoinder is, not everybody on the footpath is chosen for eviction and such drastic step of eviction is targeted only against the petitioners. That, according to the respondents, is belied by the assertion of the petitioners that they were carrying on business from different shops situate in different parts of Mumbai. This is their first assertion. That their shops were

suresh

904-WPLOO-3962.2018.doc

required for road widening and other public projects and therefore they were shifted to the present location and were allowed to make construction of shops/stalls, is the second assertion. It is stated in this affidavit that the petitioners' assertions are verified from the original record and pertaining to their specific licences. Even the Licence Register maintained by the Ward Office (of the concerned Ward) was checked and verified. The licences were issued by the Licence Department of 'S' Ward for the very first time in the year 1970 and renewed from time to time. The contention of the petitioners that they were shifted to the station road from other places around Mumbai is contrary to the office record. The Licence Register contains all the details of the hawkers and if any of the hawker is shifted either to or from other Ward, then a remark to that effect is appearing in the Licence Register. However, there is no such remark as against the petitioners' licences or their names and other details. The petitioners have therefore not been shifted from all around Mumbai to the present location. In fact the petitioners have been carrying on business from this road and that was earlier a hawking zone. However, after this Court's order of 1-11-2017, which reiterates the binding directions of the Hon'ble Supreme Court, no hawking can be permitted within 100 metres of any place of worship, holy shrines, educational institutions and hospitals, within 150 metres from any Municipal or other markets or from any railway

suresh

904-WPLOO-3962.2018.doc

station. Therefore, pursuant to the order dated 1-11-2017 of this Court, Circulars have been issued by the Municipal Corporation to the above effect dated 3-11-2017, 2-7-2018 and 25-7-2018. These Circulars seek to remove all hawkers located within a distance of 150 metres of the local and main railway stations across Mumbai.

24. Then it is once again asserted that on the station road, the board earlier displayed reading as a hawking zone has been, therefore, removed and rightly. Now display boards contrary to the earlier have been displayed and the present location is thus in a no hawking zone. Once there is a railway station (Bhandup) to which the LBS road gets connected at pre-existing locations on that road, all the buildings across this station road having been identified as either religious or educational institutions, railway station and the distance from the same to the existing location of the petitioners is within the prohibited zone, there was no alternative left but to remove and shift the petitioners from the existing location to a public market. The petitioners are alleging that outside the entrance of Gurunanak Gurudwara and Gurunanak English High School and College there are shops right on the footpath, is a misleading and false statement. There are several shops adjacent to the entrance of the Gurunanak Gurudwara and the Gurunanak School but none of them are on the footpath. They

suresh

904-WPLOO-3962.2018.doc

are on privately owned properties. The shop owners or shop keepers are paying property tax in relation to these properties to these Municipal Corporation. There are no hawkers, licenced or otherwise, on the entire footpath outside the entrance of the Gurunanak Gurudwara and Gurunanak School/College. The tax assessment bills of few shop owners are relied upon. It is, therefore, clear that the Municipal Corporation is not targeting only the petitioners. The Municipal Corporation is calling upon the petitioners to shift to another location only to redress the grievance of the pedestrians and the general public. Thus, the action is supported on the touchstone of larger public interest.

25. On the above materials, we have heard Mr. Vashi, learned Senior Counsel appearing for the petitioners and Mr. Sakhare, learned Senior Counsel appearing for the respondent-Municipal Corporation.

26. It is common ground that Mr. Vashi relies on the allegations in the memo of the petition and the rejoinder affidavit. He would contend that the municipal action deprives the petitioners of their only source of livelihood. The stalls of the petitioners are not a obstruction or hurdle to the smooth movement of traffic but an inconvenience or alleged hardship to a builder and developer, who has developed a huge private Mall across the road and which is the real cause for the



WWW.LIVELAW.IN

suresh

904-WPLOO-3962.2018.doc

impugned action. In fact there is a vague assertion that the stalls of the petitioners are hindrance to the pedestrians and vehicular movement on the road. It is vaguely suggested that the show cause notices highlight such matters but neither in the show cause notices nor in the impugned orders there is any reference to the alleged inconvenience of the pedestrians and obstruction to smooth vehicular movement. Mr. Vashi would contend that the whole action is contrary to the Parliamentary statute, the two Judgments and Orders passed by this Court and the directions issued earlier in several writ petitions filed by these petitioners. Mr. Vashi's primary argument is that, none of the statutes in the field or the larger public interest take away the petitioners' right to sell goods and articles from small premises adjacent to footpath or in a hawking zone. The location of the petitioners' stalls is such that there is no inconvenience caused to the pedestrians nor the vehicular movement is adversely affected. These are corners of the street or internal premises wherefrom such small businesses have been carried on for years together. There are no complaints. The Parliamentary statute in fact directs identification of zones and areas to enable carrying on of small street-corner business. Mr. Vashi would contend that the mandate of Articles 14 and 21 of the Constitution of India consistently points towards the right of small traders and hawkers and protects them as well. They have an equal right to

suresh

904-WPLOO-3962.2018.doc

carry on the business of their choice. Merely because they cannot afford premises of their own nor the prices prevailing in the market enable them to acquire premises on ownership basis elsewhere, that they are forced to carry on business on the road side in makeshift stalls and temporary structures. He highlights the common feature that hawking by itself is not a prohibited activity and therefore we should not allow the Municipal Corporation to implement the orders impugned in the writ petition.

27. Mr. Vashi has handed over to us a compilation and in which the Order passed by this Court on 3-11-2017 {in Notice of Motion (L) No.700 of 2017 in Writ Petition No.652 of 2017 (**Azad Hawkers Union vs. Union of India & Others**) with Public Interest Litigation No.98 of 2016 (**Sanjay Nirupam vs. State of Maharashtra & Others**) and connected matters} and an Order of 30-4-2019 {in OS Writ Petition (L) No.874 of 2019 (**Muniyandi Meena Joseph vs. The Chief Secretary & others**) with connected matters} are relied upon.

28. On the other hand, Mr. Sakhare would submit that this Court has consistently upheld such actions simply because there is an overriding public interest. The Municipal Corporation has obligatory and discretionary duties. These duties have to be performed so that the public at large is not harmed and

suresh

904-WPLOO-3962.2018.doc

inconvenienced. Maintenance, upkeep and building, laying of public streets is a statutory exercise. It is not only passage but a smooth and safe one is thus the prime inbuilt consideration. If pedestrian and vehicular movement is not impossible but becomes unsafe because of the presence of stalls, structures of street vendors within a close range of railway station, religious or holy places and educational institutions, then, according to Mr. Sakhare public safety demands that they be shifted or located elsewhere. Every attempt has to be made to avoid mishaps, accidents on account of convergence of vehicles at a busy location like a railway station, school or college. Public safety and public good outweighs and must override a private or personal right to carry on business particularly on a public street. No right is absolute or without corresponding duty.

29. The access to railway station has to be smooth and equally unobstructed. If the railway station and other rail networks are in close proximity and are within the prohibited distance so also close to a educational institution and religious structure, then all the more the petitioners cannot assert their right to carry on business from the existing premises. Mr. Sakhare would submit that the Planning Authority cannot be prohibited, in the manner suggested by the petitioners, from taking a stock of the situation from time to time and particularly

suresh

904-WPLOO-3962.2018.doc

when Mumbai City has a huge influx of people or huge mobile population. In other words, lot of people from all over the country visit Mumbai as tourists or for work or in search of a source of livelihood. The population of the City is increasing. Now the suburbs are witnessing a virtual population explosion. It is not possible, therefore, to hold on to and continue with a particular policy. If the situation and the time demands, then, necessary changes or modifications have to be effected. If the number of buses have to be raised or the vehicular and pedestrian movement is increasing and therefore arrangement has to be made for the smooth flow thereof, then, additional restrictions would have to be placed on the right to carry on business on roads. One cannot, therefore, insist on carrying on his/her business from such location. The petitioners therefore should understand that the Municipal Corporation is obliged to serve the public and for that purpose it is calling upon them not to stop their business activities altogether but to shift to other premises and in the close proximity of the existing premises from where the business can be carried on by each of these writ petitioners. Mr. Sakhare would submit that the writ petition must be dismissed.

30. The writ petition in hand makes a reference to hawker's licence. A photocopy of a hawker's licence on page 34 of the paper-book would reveal that one Venkat Ailaya

suresh

904-WPLOO-3962.2018.doc

Bhasha Boina is a hawker. He is stated to be carrying on business from a stall opposite Masoom Store, Bhandup Station Road, Bhandup (West), Mumbai – 400 078. At page 35 is a photocopy of the licence issued to other hawker and his shop is known as stall No.36, opposite Apsara Jewellery, Bhandup Station Road, Bhandup (West), Mumbai. Similar is the position of the other licence holder, the photocopy of whose licence is at Exhibit-B3, page 36 of the paper-book. He is stated to be a resident of Bhandup itself but carrying on his business from Bhandup Station Road, Bhandup (West), Mumbai. Then another premises from where a distinct hawker is carrying on business are also identified as situate opposite Gurunanak High School, Bhandup Station Road, Bhandup (West), Mumbai. Stall No.56 opposite Gurunanak High School is allotted to one Omprakash Ayodhya Gupta. The Order passed by this Court, copy of which is at page 39 of the paper-book, concerns challenge to proposed eviction of the petitioners therein by the Municipal Corporation. The allegation in that petition was that, the petitioners are licensees of land on which they were allowed to construct shops. The licences annexed to that petition show that the licences were given for 1x2 metres of land for construction of shops. Now the respondents desired to take over the strip of land for the purpose of road widening and they had offered accommodation to the petitioners equivalent to the size they were occupying. The petitioners in that petition were

suresh

904-WPLOO-3962.2018.doc

not satisfied with this allotment and contended that no notice was given to them of their eviction. There was a stay granted and that was hampering the work of road widening. This Court therefore modified the Order of stay and directed the Municipal Corporation not to evict the petitioners (in OSWP-3/2008 with WPL-1018/2007) till notice is given to them and they are heard. We do not think that this order carries the case of the present petitioners any further. There, a clear action of eviction and without notice was challenged by other licencees who said that they have a interest, albeit limited, in the land. Thereafter, we have copies of the notices which are issued on prior occasion at pages 44 and 49-50.

31. The petitioners in the present petition challenged the notice at page 44 and their Writ Petition (L) No.1557 of 2015 was disposed of on 8-6-2015 by an Order passed by this Court granting liberty to the Municipal Corporation to issue fresh notice after the Advocate for the Municipal Corporation stated, on instructions, that the Corporation withdraws the notices impugned in that petition. We do not think that this case and the order thereon is also of any assistance to the petitioners.

32. Then followed series of notices and which informed the petitioners to remain present should they desire a personal

suresh

904-WPLOO-3962.2018.doc

hearing. In the circumstances, once again this Court was approached apprehending that though the hearing is scheduled but the Municipal Corporation may still evict the petitioners that the minimal protection from forcible eviction was granted.

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

suresh

904-WPLOO-3962.2018.doc

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.

35. The petitioners were served fresh notices. Their repeated approach to this Court by invoking its writ jurisdiction

suresh

904-WPLOO-3962.2018.doc

has not met with any success. All that they have succeeded in is compliance with technicalities. The technicalities involved are either a proper notice was not issued or issued but not served or issued and served but there was no proper opportunity of hearing. Now everything has been complied with. Today there is no dispute nor a grievance by Mr. Vashi that there is no notice or that there was no fair or reasonable opportunity of being heard afforded prior to the subject orders. In fact we find that the petitioners had earlier approached this Court by filing (OS) Writ Petition No.3149 of 2018. On 5-10-2018, this Court passed an Order disposing of that petition. That Order gave a fresh opportunity to the respondents to cause removal or shifting of the petitioners. That opportunity was to be availed by giving another or a fresh notice. In fact the notice was to comply with the Order, passed in Writ Petition No.652 of 2017 and connected matters, on 1-11-2017. The Order of 5-10-2018 takes note of all this and reads as under:-

“1. The learned Senior Counsel Mr. Sakhare, appearing for the Corporation, submits that the Corporation intends to issue fresh notice to the petitioners in accordance with the directions issued by the Division Bench of this Court (Coram : B. R. Gavai and M. S. Karnik, JJ.) in Writ Petition No. 652 of 2017 and connected matters on 1/11/2017. The learned Senior Counsel submits that within two weeks from today fresh notice, as stated above, will be issued to the petitioners.

2. After service of said notice by the Designated Authority of the Corporation, petitioners/affected parties

suresh

904-WPLOO-3962.2018.doc

are at liberty to file reply to the said notice within two weeks thereafter. The Designated Authority, thereafter, would hear the petitioners/affected parties and decide the issue by giving brief reasoned order, in case the petitioners/affected parties appear before it within one week thereafter.

3. *The schedule of hearing is as under :-*

(a) The Corporation / Designated Authority would issue fresh notice to the petitioners / affected persons, within two weeks from today, in accordance with the directions issued by the Division Bench of this Court (Coram : B. R. Gavai and M. S. Karnik, JJ.) in Writ Petition No. 652 of 2017 and connected matters on 1/11/2017.

(b) Within two weeks thereafter, the petitioners / affected parties are entitled to file reply.

(c) After filing of reply, within the stipulated time, the Designated Authority/Corporation would hear the petitioners/affected parties on 2/11/2018, in case they appear before it, and decide the issue by giving brief reasoned order within one week thereafter.

4. *In the light of the above, the impugned orders 24th September, 2018 are quashed and set aside.*

5. *It is clarified that we have not expressed any opinion on merits of the matter. All issues are kept open.*

6. *Writ Petition is disposed of accordingly."*

Pursuant to that order, we find that the petitioners gave a detailed response on 24-10-2018. That is a response in writing. That is on the file of the Municipal Corporation. After that the Municipal Corporation proceeded to consider the stand of the



WWW.LIVELAW.IN

suresh

904-WPLOO-3962.2018.doc

petitioners. We find that there is a speaking order passed. The speaking order says that, the matter is approached, dealt with and decided as per the Order of this Court as also the Judgment of the Hon'ble Supreme Court which highlight that no hawking zone can ever be erected or created within 100 metres from any place of worship, holy shrine, educational institutions and hospitals or within 150 metres from any Municipal or other markets or from any railway station. The present location of each of the petitioners is indeed falling within a prohibited zone. It is of a excepted category. Right to hawk on a street or road but otherwise than in the above category is, at best, protected by the statute. That too is not in absolute terms. All statutes of this nature are equally protective of larger public interest, public health + public safety. The station road now known as Sant Shiromani Maharaj Road is a non-hawking zone. No hawking is permitted on this road because there are places of worship, holy shrines, educational institution and municipal market. They are around and within close proximity or rather within the specified distance. The petitioners' shops have therefore to be necessarily removed and they have to be shifted. The speaking order says that there is hindrance to the pedestrians, to vehicular movement and there are school kids who are alighting and boarding buses. There is a regular fleet of buses operated by B.E.S.T. and there are rickshaws. All of these are trying to access the railway station (Bhandup) throughout the day. The

suresh

904-WPLOO-3962.2018.doc

members of the public access the LBS Road after getting down from the local railway at Bhandup railway station. Thus, this is a connecting road taking them to LBS road. Bearing in mind all this, the petitioners have been directed to take possession of the permanent alternate accommodation offered to them. The offer in writing to that effect is of 2008. It is common ground that though the letter of offer is addressed by the MMRDA, it is stated before us, on instructions by Mr. Sakhare that the MMRDA market is completely operated and made functional now by the Municipal Corporation. It has power to allot galas or shops therein. The stalls are therefore under the control and in possession of the Municipal Authorities. This market is at the rear or just behind the present location. The operative order, therefore, very clearly directs the petitioners to remove their belongings and vacate the existing stalls, to shift immediately to the shops which were allotted to them in the MMRDA/Municipal market, failing which the Municipal Corporation of Greater Mumbai will remove them at their risk as to costs and consequences. The operative order reiterates that the existing stall is within 100 metres from the place of worship, holy shrine/ Gurudwara – Sri Guru Singh Sabah, an educational institution, namely, Sri Gurunanak English High School and Junior College and therefore the mandate of the law as also the directions of this Court and the Hon'ble Supreme Court are violated and flouted. We do not see how in writ jurisdiction we can interfere

suresh

904-WPLOO-3962.2018.doc

with such findings of fact merely because the petitioners contend that the existing premises are not located within 100 metres or 150 metres from afore-noted places. We do not think that in writ jurisdiction embarking upon another factual round is possible. In our limited powers it is not possible to adjudicate and as completely and effectively as in other proceedings, on matters such as location, distance, proximity to vital institutions. Apart from that we could have accepted categorical assertions supported by documentary evidence and equally municipal records involving no factual dispute at all. In fact, by the petitioners' contrary and contradictory stand there is no dispute requiring a probe much less any adjudication. We had made it clear to the petitioners' counsel and repeatedly that we cannot go into all factual assertions when the petitioners, at one point of time, have contended that not all hawkers but only those who are obstructing the smooth flow of traffic and pedestrian movement should be removed. This assertion itself is destructive of the petitioners' case. That their activities pose a hurdle and hindrance to the smooth flow of vehicular traffic and pedestrian movement is clear and is admitted. There are others who are also indulging in similar acts and they remain untouched, is then the complaint. This is not an assertion which can be upheld in writ jurisdiction particularly when it is coming from, admittedly, hawkers hawking in a no hawking zone. The hawkers have a limited right. They cannot claim absolute and



WWW.LIVELAW.IN

suresh

904-WPLOO-3962.2018.doc

unconditional right to squat on pavements or footpaths. They cannot say that they will erect structures or stalls on footpaths from where they will sell their goods and articles permanently. We wonder whether this stand will ever go down, leave alone accepted by a writ Court. We do not think that in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India we can discard or omit overwhelming contrary documentary evidence produced by a public body. That all affidavits of the public body are based on official records and undisputedly each one of the petitioners is hawking on the station road therefore enables us to uphold the impugned orders. We do not think that we should be a party to acts of general public inconvenience or having adverse impact on public interest. The writ jurisdiction can never be utilised to defeat an order of the present nature. Upholding of the petitioners' stand will be destructive of the larger public interest. In these circumstances and when the impugned orders assign cogent and satisfactory reasons for issuance of the notices and the ultimate direction, we do not think that this writ petition deserves to succeed. All the more when the petitioners' right to carry on business of their choice is not taken away in the least. All that they have to now do is to carry on identical activities from another location and which is on that very road. It is a Municipal market on that very station road from where they can carry on their business. That they have to compete with others

suresh

904-WPLOO-3962.2018.doc

or established shop keepers is no ground to interfere with the impugned orders.

36. As a result of the above discussion, the writ petition fails. It is dismissed but without any order as to costs.

37. At this stage, Ms Devkar prays for a stay of this Order.

38. Firstly, this Order dismisses the writ petition. We do not see how a stay can be granted of such an Order. Secondly, if the stay prayed is of the orders passed by the Municipal Corporation and the operative direction, then, that is of relocation to another shop from the existing site. That is not something which is going to happen immediately and we had made it clear to Ms Devkar that should any of the petitioners or the persons whose names are listed in the exhibits to the petition desire to accept the offer of the alternate accommodation as a permanent one, they will be given time to shift their goods, belongings and articles from the existing location and to handover peaceful possession thereof to the Municipal officials. We know that the festival of Diwali is going to be celebrated by the end of this month. That the petitioners or other hawkers may desire to celebrate that festival or have a sale of the articles and goods from the existing locations so that they do not suffer any loss in this festive season. However, the

suresh

904-WPLOO-3962.2018.doc

request is not of that nature. The stand is that, we may or may not shift to the alternate accommodation offered by the Municipal Corporation but the Municipal Corporation should not evict us in terms of the impugned orders and relocate us forcibly for we are not accepting their offer. That is surely impermissible in writ jurisdiction. This is not a case of permanent dislocation and total loss of the source of livelihood. This is a case where premises on the pavement in very close proximity to educational institutions and railway station would have to be vacated and the business will now have to be carried on from elsewhere but within the same locality. If that is how the impugned orders read, then, we see no reason to grant the request made by Ms Devkar. This is unheard of for we cannot countenance the plea of the hawkers that they have a unconditional and absolute right of carrying on their business from a no hawking zone even if it may cause inconvenience to the public. That is surely not how the writ jurisdiction is exercised nor it can be extended to perpetuate a wrong of the nature found in this petition. The request is therefore rejected.

(G.S. PATEL, J.)

(S.C. DHARMADHIKARI, J.)