

A

MUNICIPAL CORPORATION OF
GREATER MUMBAI & ORS.

v.

B

RAFIQUNNISA M. KHALIFA (DECEASED)
THROUGH HIS LEGAL HEIR
MR. MOHD. MUQUEEN QURESHI & ANR.
(Civil Appeal Nos. 1727-1732 of 2019)

FEBRUARY 18, 2019

**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

C

Mumbai Municipal Corporation Act, 1888:

D

s. 312 and 314(1) – Removal of stalls/structures by the appellant-Municipal Corporation – Challenged by the respondents by filing writ petition – High Court allowed the petition setting aside the order of the appellant-Corporation and issued Writ of Mandamus directing the Corporation to provide each respondent suitable land in the same or adjacent area – On appeal, held: s. 312 prohibits erection of any structure without permission of the Corporation upon any street, open channel, drain, well or tank in any street which causes obstruction or encroachment etc.– s. 314(1) empowers removal of any structure in contravention of the provision in s. 312(1) after coming into force of Extension of Limits Act, 1950 and Further Extension of Limits Act, 1956 – In the present case, removal of the structures erected by the respondents was on invoking power u/s. 314, as the structure were in contravention of the provisions in s. 312 – A writ of mandamus u/Art. 226 of the Constitution is issued where there is a right and a corresponding duty – In the present case there was neither a right (contractual or legal) nor any provision casting an obligation to provide any alternate land, hence High Court was not justified in issuing Writ of Mandamus – Constitution of India – Art. 226 – Writs – Writ of Mandamus – Bombay Municipal (Extension of Limits) Act, 1950 – Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956.

E

F

G

Allowing the appeals, the Court

H

HELD: 1. Section 312 of the Mumbai Municipal Corporation Act, 1888 prohibits erecting of any structure or fixture of any

nature such as - wall, fence, rail, post, step, booth upon any street or over any open channel, drain, well or tank in any street which causes obstruction or encroachment or projection or to occupy portion of such street, channel, drain, well or tank as the case may be. Only those structures/fixtures are saved from Section 312 of the Act which are erected with the permission of the Commissioner granted under Sections 310 and 317 of the Act. [Para 18][1044-B-C]

2. Section 314(1) confers power on the Commissioner to remove any wall, fence, rail, post, step, booth or other structure or fixture which is found erected or set up on any street, open channel, drain, well or tank contrary to the provisions of sub-Section (1) of Section 312 of the Act after coming into force the provisions of Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after coming into force Further Extension of Limits and Schedule BBA (Amendment) Act, 1956. In order to exercise the power under Section 314 (1), two conditions must be present. First, the disputed wall, fence, rail, post, step, booth or any other type of structure or fixture, as the case may be, is erected or set up on any public street or open channel or drain or well or tank; and Second, any such structure or fixture, as the case may be, is erected or set up in the city or suburbs contrary to the provisions of Section 312(1) of the Act after coming into force the two Acts specified in sub-section (1). [Para 19][1044-D-F]

3. The counter affidavit, map and the photographs of the site in question clearly show that the stalls/structures of the respondents were found erected on the sewer line/chamber; these structures/stalls were not erected by the respondents with the permission of the Commissioner as required under Section 312 (1) of the Act; no sanctioned map was filed by the respondents to prove that the structures were legal; and the stalls/structures were causing obstruction to public at large and were causing encroachment on the street (Bandra Station Road), which is very narrow. Therefore, the appellant (Commissioner) was justified in invoking the powers under Section 314 of the Act against the respondents for removal of their stalls/structures. Since the action to remove the stalls/structures was taken under Section 314 of the Act, it was not necessary to give any prior notice to

A the respondents though a circular was issued on 05.10.2015 requesting the respondents to remove their stalls/structures from the site in question. [Paras 22 and 23][1045-B-D]

B 4. Grant of health license has nothing to do with erection of stall/structure and its removal. In order to exercise the power under Section 314 of the Act, the conditions specified therein need to be satisfied. Section 314 nowhere says that if a person is carrying on any activity in such stall/structure on the strength of health license on the street, or open channel, drain, well or tank, no action to remove such stall/structure can be taken against such person. [Para 26][1045-G]

C 5. The High Court was, therefore, not justified in striking down the action of the appellant (Commissioner) taken under Section 314 of the Act for removal of their stalls/structures. The High Court was also not justified in issuing a mandamus directing the appellant-Municipal Corporation to provide to each respondent some suitable land either in the same area or in adjacent area. [Para 27][1046-B]

D 6. A writ of mandamus under Article 226 of the Constitution is issued, when there is a right and correspondingly there is a legal duty to perform. In the present case, neither there was any right (contractual or legal) in writ petitioners' favour and nor there is any provision in the Act which casts an obligation to provide any alternate land to the respondents. [Para 28][1046-C]

E 7. There is also no scheme/policy made in this behalf by the appellants or the State, which could be enforced by the respondents. Moreover, once this Court holds that the action taken under Section 314 of the Act against the respondents is legal and proper, there is no occasion to issue any mandamus much less the mandamus of the nature issued by the High Court. [Para 29][1046-D]

F CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1727-1732 of 2019.

From the Judgment and Order dated 12.06.2018 of the High Court of Judicature at Bombay in Writ Petition Nos. 2639, 2184, 2642, 2641, 2644 and 2746 of 2016.

H

Shyam Divan, Atul Chitale, Sr. Advs., Ms. Asha Gopalan Nair, A
Ms. Preeti Purandare, Ms. Nivedita Nair, Ms. Shivangi Khanna,
Gurjyot Sethi, Advs. for the Appellants.

Sunil Fernandes, Omkar Khanvilkar, Ms. Nupur Kumar, B
Ms. Anju Thomas, Ms. Miloni Sanghvi, Ms. Deepa M.Kulkarni,
Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Advs. for the
Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J.

1. Leave granted. C

2. These appeals are directed against the final judgment and order dated 12.06.2018 of the High Court of Judicature at Bombay in Writ Petition(c) Nos.2639, 2184, 2642, 2641, 2644 and 2746 of 2016 whereby the High Court allowed the writ petitions filed by the respondents herein.

3. A few facts need mention hereinbelow to appreciate the short D
controversy involved in these appeals.

4. Respondent No.1 in all the appeals (total 6) were the writ petitioners and the appellants (1 to 6) herein were the respondents in the six writ petitions out of which these appeals arise.

5. The six respondents individually filed six separate writ petitions E
against the Municipal Corporation of Greater Mumbai (appellant No.1 herein) and their officials including the Collector (Respondent Nos.2 to 6) and sought common reliefs in their individual writ petitions against the appellants on identical, factual and legal pleadings/grounds.

6. According to six writ petitioners (respondent No. 1 in all the F
appeals), one was running his restaurant in a stall under the name “Yadgar Restaurant” at Bandra Station Road. The other writ petitioner was running a “Pan Shop” in a stall in front of Yadgar Restaurant. The third writ petitioner was running a food stall under the name “Lucky Kabab Corner” at Bandra Station Road. The fourth writ petitioner was running a food G
stall under the name “Danish Kabab Corner” at Bandra Station Road. The fifth writ petitioner was running a food stall under the name “Gulsik-Kabab and sweetmeat shop” at Bandra Station Road and sixth writ petitioner was running a food stall under the name “A-1 Seak Kabab” at Bandra Station Road.

H

A 7. All the six writ petitioners sought the relief of mandamus on
the identical allegations against the appellants *inter alia* contending that
the officials of the Municipal Corporation illegally removed their stalls/
structures on 26.05.2016 without any prior notice to any of them. The
writ petitioners alleged that the action on the part of the Municipal
B Corporation and their officials (appellants herein) while undertaking the
removal of the writ petitioners' food/pan stalls situated at Bandra Station
Road was wholly arbitrary, illegal and against the relevant provisions of
the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as
"The Act").

C 8. It was alleged that each writ petitioner was holding the health
license issued by the Municipal Corporation (appellant No.1 herein) for
running their respective stalls on the site in question and, therefore, the
appellant No.1-Municipal Corporation was not justified and nor had any
right under the Act to initiate any action for the removal of their stalls
much less without any prior notice.

D 9. It was alleged that the action to remove the structures/stalls
was not in conformity with any provision of the Act inasmuch as it also
violated the principle of natural justice. It was equally in breach of
Article 14 of the Constitution.

E 10. The writ petitioners, on the aforementioned allegations, claimed
the reliefs that the appellant No.1-Municipal Corporation be directed to
put the writ petitioners in possession of the site in question or in the
alternative to provide them with any other suitable site in the city where
they could start their business afresh and further direct the appellants to
pay to each writ petitioner a reasonable compensation for the loss of
F their business and the inconvenience caused to them on account of
impugned removal done by appellant No.1-Municipal Corporation on
26.05.2018.

G 11. The appellants opposed the writ petitions by filing reply in
some of the writ petitions. The appellants *inter alia* contended that they
were compelled to take the action under Section 314 of the Act because
these stalls/structures were found erected on the public sewer. It was
contended that since these stalls/structures were causing hindrance in
cleaning the public sewer lines and were found to have been erected
without any sanctioned plan, they had to be removed in public interest. It
was also contended that these stalls/structures were also causing traffic

H

congestion on Bandra Station Road. It was lastly contended that before taking the action, the health licenses granted to the writ petitioners were cancelled and a circular was issued on 05.10.2015 for removal of these unauthorized stalls/structures. A

12. By impugned order, the High Court allowed the writ petitions. It was held that the appellant (Municipal Corporation) was not able to prove that the case in question falls under Section 314 of the Act. The High Court, therefore, struck down the action taken by the Municipal Corporation and issued 9 directions in the nature of mandamus against the appellants. These 9 directions read as under: B

- (i) We direct the Mumbai Municipal Corporation to allot to the Petitioners stalls/shops of the same size which were demolished on 26th May, 2016 in the same locality or in nearby locality; C
- (ii) The locality shall be such that the petitioners are in a position to carry on the same business which they were carrying on in the demolished structures; D
- (iii) The Allotment shall be made to the Petitioners as expeditiously as possible and in any event, within a period of two months from the date on which this judgment and order is uploaded; E
- (iv) The Petitioners will be liable to pay the fee/charges, if any, which were payable in respect of the demolished structures;
- (v) On the failure of the Municipal Corporation to erect allot the stalls/shops as directed above within the period of two months from the date on which this judgment and order is uploaded, it will be open to the Petitioners to re-construct their structures/stalls at the places where the same were situated; F
- (vi) However, the re-construction shall be made by using the same construction material and that also with advance notice at least of 48 hours to the Designated Officer of the concerned Ward who or his nominee shall be entitled to remain present at the time of re construction; G

H

A (vii) **We make it clear that in respect of re-constructed shops, the Petitioners will not be entitled to claim any equity. If the original stalls which were demolished were illegal, it will be always open for the Municipal Corporation to initiate an action of demolition of the re-constructed stalls in accordance with law;**

B (viii) **As far as the prayer for compensation is concerned, it will be always open for the Petitioners to make appropriate representation to the Municipal Corporation along with all the particulars and documents. If such representations are made, the**
C **Municipal Corporation shall decide the same within a period of three months from the date of filing of the representations;**

(ix) The Petitions are made absolute in the above terms with no order as to costs.”

D 13. The Municipal Corporation felt aggrieved by the impugned order and has filed the present appeals by way of special leave in this Court.

E 14. So, the short question, which arises for consideration in these appeals, is whether the High Court was justified in allowing the respondents’ writ petitions and issuing 9 directions quoted above.

 15. Heard Mr. Shyam Divan and Mr. Atul Chitale, learned senior counsel for the appellants and Mr. Sunil Fernandes and Ms. Deepa M. Kulkarni, learned counsel for the respondents.

F 16. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeals, set aside the impugned order and dismiss the writ petitions.

 17. Sections 312 and 314 of the Act, which are relevant for disposal of these appeals, read as under:

G **“312. Prohibition of structures or fixtures which cause obstruction in streets.**

(1) No person shall, except with the permission of the Commissioner under section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure or
H

fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street, channel, drain, well or tank. A

(2) Nothing in this section shall be deemed to apply to any erection or thing to which clause(c) of section 322 applies. B

“314. Power to remove without notice anything erected, deposited or hawked in contravention of Section 312, 313 or 313A. C

The Commissioner may, without notice, cause to be removed-

(a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section(1) of section 312, after the same comes into force in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after the date of the coming into force of the Bombay Municipal Further Extension of Limits and Schedule BBA (Amendment) Act, 1956; D E

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached, or suspended in, upon from or to any place in contravention of sub-section(1) of section 313; F

(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of Section 313A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale. G

(d) any person, unauthorisedly occupying or wrongfully in possession of any public land from such land together with all the things and material unauthorisedly placed, projected or deposited on such land by such person H

A **Provided that, the Commissioner shall, while executing such removal, allow such person to take away his personal belongings and household articles, such as cooking vessels, bed and beddings of the family, etc.”**

B 18. Section 312 of the Act prohibits erecting of any structure or fixture of any nature such as - wall, fence, rail, post, step, booth upon any street or over any open channel, drain, well or tank in any street which causes obstruction or encroachment or projection or to occupy portion of such street, channel, drain, well or tank as the case may be. Only those structures/fixtures are saved from Section 312 of the Act
C which are erected with the permission of the Commissioner granted under Sections 310 and 317 of the Act. In other words, Section 312 has no application to those structures/fixtures which are erected by the person with the permission of the Commissioner under Sections 310 and 317 of the Act.

D 19. Section 314(1) with which we are concerned in this case confers power on the Commissioner to remove any wall, fence, rail, post, step, booth or other structure or fixture which is found erected or set up on any street, open channel, drain, well or tank contrary to the provisions of sub-Section (1) of Section 312 of the Act after coming into
E force the provisions of Bombay Municipal (Extension of limits) Act, 1950 or in the extended suburbs after coming into force Further Extension of Limits and Schedule BBA (Amendment) Act, 1956.

F 20. In other words, in order to exercise the power under Section 314 (1) of the Act, two conditions must be present. First, the disputed wall, fence, rail, post, step, booth or any other type of structure or fixture, as the case may be, is erected or set up on any public street or open channel or drain or well or tank; and Second, any such structure or fixture, as the case may be, is erected or set up in the city or suburbs contrary to the provisions of Section 312(1) of the Act after coming into
G force the two Acts specified in sub-section (1).

21. Coming now to the facts of the case, it is apposite to mention here that the appellants filed certain additional documents in these appeals such as map and the photographs of the site in question in support of their case. These documents were not filed before the High Court as is clear from the perusal of the impugned order. These documents were

H

allowed to be taken on record being relevant and material for deciding the issue involved in these appeals. The respondents, however, did not dispute the veracity of these documents and, therefore, these documents remained indisputable. A

22. Perusal of the counter affidavit, map and the photographs of the site in question clearly show that, first, the stalls/structures of the respondents were found erected on the sewer line/chamber; Second, these structures/stalls were not erected by the respondents with the permission of the Commissioner as required under Section 312 (1) of the Act; Third, no sanctioned map was filed by the respondents to prove that the structures were legal; and fourth, the stalls/structures were causing obstruction to public at large and were causing encroachment on the street (Bandra Station Road), which is very narrow. B C

23. In the light of the aforementioned four factors being present, we are of the considered opinion that the appellant (Commissioner) was justified in invoking the powers under Section 314 of the Act against the respondents on 26.05.2018 for removal of their stalls/structures. Since the action to remove the stalls/structures was taken under Section 314 of the Act, it was not necessary to give any prior notice to the respondents though a circular was issued on 05.10.2015 requesting the respondents to remove their stalls/structures from the site in question. D

24. We are, therefore, unable to find any illegality or arbitrariness or unreasonableness in the action taken by the Commissioner under Section 314 of the Act, which resulted in removal of the respondents' stalls/structures. E

25. Learned counsel for the respondents, however, argued that since the respondents were granted health licenses under the Act for selling their foodstuff in these stalls/structures, their removal from the site in question was illegal. F

26. We find no merit in this submission. In our opinion, grant of health license has nothing to do with erection of stall/structure and its removal. In order to exercise the power under Section 314 of the Act, the conditions specified therein need to be satisfied. Section 314 nowhere says that if a person is carrying on any activity in such stall/structure on the strength of health license on the street, or open channel, drain, well or tank, no action to remove such stall/structure can be taken against such person. The action under Section 314 can be attacked successfully G H

- A only by showing that the person had erected his stall/structure with the permission of the Commissioner granted under Section 312(1) of the Act. Such is, however, not the case here.

27. In our opinion, the High Court was, therefore, not justified in striking down the action of the appellant (Commissioner) taken under Section 314 of the Act for removal of their stalls/structures on 26.05.2018. The High Court was also not justified in issuing a mandamus directing the appellant-Municipal Corporation to provide to each respondent some suitable land either in the same area or in adjacent area.
- B

28. It is a settled principle of law that a writ of mandamus under Article 226 of the Constitution is issued, when there is a right and correspondingly there is a legal duty to perform. In this case, neither there was any right (contractual or legal) in writ petitioners' favour and nor there is any provision in the Act which casts an obligation to provide any alternate land to the respondents.
- C

29. We also do not find any scheme/policy made in this behalf by the appellants or the State, which could be enforced by the respondents. Moreover, once this Court holds that the action taken under Section 314 of the Act against the respondents is legal and proper, there is no occasion to issue any mandamus much less the mandamus of the nature issued by the High Court.
- D

30. In view of the foregoing discussion, the appeals succeed and are accordingly allowed. The impugned order is set aside. As a consequence, the writ petitions out of which these appeals arise are dismissed.
- E