

M. Rajkumar and Others Vs. the Excise Superintendent, Hyderabad and Others

M. Rajkumar and Others Vs. the Excise Superintendent, Hyderabad and Others

SooperKanoon Citation : sooperkanoon.com/423940

Court : Andhra Pradesh

Decided On : Feb-14-1991

Reported in : AIR1992AP143; 1991(1)ALT653

Judge : Sardar Ali Khan and ;M.N. Rao, JJ.

Acts : Hyderabad Municipal Corporations Act, 1956 - Sections 405 and 406; Land Acquisition Act - Sections 18; Hyderabad Municipal Corporations Act, 1955 - Sections 405 and 406

Appeal No. : Writ Appeal Nos. 109 of 1991 and Writ Petn. No. 1285 of 1991

Appellant : M. Rajkumar and Others

Respondent : The Excise Superintendent, Hyderabad and Others

Advocate for Def. : Govt. Pleader for Excise and Khader Ali Khan, Stading Counsel for MCH

Advocate for Pet/Ap. : M/s. E. Ella Reddy, ;R.S. Raju and ;T. Amarnath Goud, Advs.

Judgement :

ORDER

Sardar Ali Khan, J.

1. Mr. M.Rajkumar, writ petitioner No. 1 is a licensee for the Arrack Unit Twin Cities Hyderabad District for the excise year 1990-91. Petitioners 2 and 3 claim to be owners of the premises of the shop situate at Osman Shahi in Survey No. 9/ 2, Ward No. 202 Block No.C of an extent of 382.66 Sq. Yards.

2. The case of the 1st petitioner, in a nutshell, is as follows:-- He was the highest bidder and auction purchaser in respect of Arrack Unit Twin Cities Hyderabad District of 128 arrack shops for the excise year 1990-91. Having completed all the formalities, the excise authorities granted licences in respect of other shops, except in respect of Osman Shahi arrack shop on the ground of non-acceptability of the premises. Then the 1st petitioner filed W.P. No. 13977/90 on 24-9-1990 which was allowed by this Court on 5-10-1990 directing the authorities to issue licence in respect of Osman Shahi arrack shop in the existing premises. Aggrieved by the order dated 5-10-1990 in W.P. No. 13977/90 respondents 1 and 2 herein and the Commissioner of Excise have preferred Writ Appeal No. 1223/90 which was dismissed on 29-10-1990, and the authorities were obliged to issue licence for the sale of arrack and toddy in the same existing premises of Osman Shahi on 17-11-1990, The contention of the 1st petitioner is that he is carrying on business in the premises since 17-11-1990. There is a detailed narration of the facts indicating the ownership of the land in question, in the affidavit filed in support of the writ petition, which may not be material for the purpose of a decision in the writ appeal before us, suffice it to state that the premises in which the toddy shop is located in Osman Shahi is said to have been owned by one late Mali Muthamma, wife of Laxmaiah and that late Mali Muthamma was the mother of late Jangaiah, who is the husband of the 2nd petitioner and the father of the 3rd petitioner herein. Petitioners 2 and 3, in fact filed O.P. No. 35 / 86 on the file of the I Additional Judge, City Civil Court, Hyderabad under S. 18 of the Land Acquisition Act and the learned Subordinate Judge, by an order dated 18-1-1988, found that petitioners 2 and 3 are the father-in-law and grandson respectively of late Mali Muthamma and further found that petitioners 2 and 3 are the owners of the land comprised in Survey No. 17, corresponding to S.No. 9/2, Ward No. 202 Block-C and they were held to be entitled to the compensation for the land acquired by the Government.

More over, the District Revenue Officer, Hyderabad District in his proceedings in Case No. B2/139/87, dated 7-3-1987, exercising the powers conferred under B.S.O. 34-D., directed the M.R.O., Musheerabad to restore the title of Mali Muthamma and carry out necessary changes in the town survey records.

3. The contention of the petitioners is that none of the respondents had called the writ petitioners to show cause why the structures put on the land, bearing Town Survey No. 9/ 2 Block 'C' Ward No. 22, shall not be demolished and the business be stopped from being carried on in the said premises. Petitioners 1 and 2 have filed W.P. No. 704/91 which was allowed to be withdrawn at the admission stage with a right to seek redressal afresh in respect of their rights. The said writ petition was withdrawn reserving the right to file a fresh writ petition inasmuch as full particulars were not given and the necessary parties were not impleaded. The prayer in the writ petition is that the respondents shall be directed not to interfere with the carrying on of the business by the first petitioner in respect of Osman Shahi arrack shop in any manner for the excise year 1990-91 or in the alternative to direct respondents 1 and 2 not to collect the proportionate rentals pending disposal of the writ petition.

4. The main contention of the writ petitioners is that the Municipal Corporation of Hyderabad is now seeking to take action under S.405 of the Hyderabad Municipal Corporations Act without giving any notice thereby trying to remove the structures erected on the premises. Mr. Khader AH Khan, learned Standing Counsel for the Municipal Corporation of Hyderabad has indeed, contended strenuously that the Municipality has, in fact, removed the structure that was existing on the premises, which is vehemently denied by the other side and it is stated that it was only a pillar here and there which was sought to be removed and the structure still remains in tact.

It would be in the fitness of things to refer to S.405 and S.406 of the Hyderabad Municipal Corporations Act, 1955, which are in the following terms;--

'405. Commissioner may without notice, remove anything erected, deposited or hawked or exposed for sale in contravention of Act:--

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

(a) any wall, fence, rail, post, step, booth or other structure whether fixed or movable and whether of a permanent or a temporary nature, or any fixture which shall be erected or set up in or upon or over any street, any open channel, drain, well or tank contrary to the provisions of this Act;

(b) any stall, chair, bench, box, ladder, board or shelf, or any other thing whatever placed, deposited, projected, or suspended in, upon, from or to any place in contravention of this Act;

(c) any article whatsoever hawked or exposed for sale in a public place or in any public street in contravention of the provisions of this Act and any vehicle, package, box or any other thing in or on which such article is placed.'

406. Power to require removal of a structure or fixture erected or set up:--

The Commissioner may, by written notice, require the owner, occupier of any premises contiguous to, or in front of, or in connection with which any wall, fence, rail, post, step, booth or other structure or fixture which it would be unlawful to erect or set up under this Act has been erected or set up to remove the said wall, fence, rail, post, step, booth or other structure or thing:

Provided that, if any such case the structure or fixture shall have been lawfully erected or set up, compensation shall be paid by the Commissioner to every person who sustains loss or damage by the removal or alteration thereof.'

5. A close reading of S. 405 reveals the fact that the Commissioner has been authorised to (remove, without notice, any wall, fence, rail, post, step, booth or other structure, whether fixed or movable and whether of a permanent or a temporary nature or any fixture which shall be erected or set up in or upon or over any street, any open channel, drain, well or tank contrary to the provisions of the Hyderabad Municipal Corporations Act. While we come to the provisions of S. 406, it is provided that the Commissioner may, by written notice, require the owner, occupier of any premises contiguous to or in front of or in connection with which any wall, fence, rail, post, step, booth or other structure or fixture which it

would be unlawful to erect or set up under the Act has been erected or set up to remove the said wall, fence, rail, post, step, booth or other structure or thing. The essential difference between the two sections is that under S.405 the Commissioner is empowered to take action without any notice but under S.406 a notice is mandatory. Mr. Khader Ali Khan, learned counsel for the Municipal Corporation has contended that in a case like this where the structure is an unauthorised structure, the Commissioner has got the power to cause the demolition of the said structure without giving any notice. He has further submitted that in view of the fact that there is a total demolition of the premises, the writ petition itself has become infructuous and therefore there is no question of granting any relief to the petitioners.

6. We would like to consider the above two submissions principally made by the learned standing counsel for the Municipal Corporation of Hyderabad, in serial. The first submission made by the learned standing counsel for the Municipal Corporation that S.406 empowers the Commissioner to take action without giving a notice to the petitioner who has been carrying on this trade since 17-10-1990 in lieu of a licence granted by the excise authorities, does not stand to reason. The essential feature of the case to substantiate this point seems to be as follows:-- Under S.406 what is really contemplated is that where the situation brooks no delay and where there is a clear element of urgency involved in the matter, for instance, if any wall, fence, rail, post, step, booth or other structure, whether fixed or movable and whether of a permanent or a temporary nature or any fixture which has been erected or set up in or upon or over any street, any open channel, drain, well or tank, contrary to the provisions of the Act, then, obviously, it stands to reason that the Commissioner cannot be put to the trouble of giving notice in such matters, which call for immediate remedy to be resorted to remove the obstacle which has been created in the public interest. It is also note-worthy that the type of structure referred to in S. 406(a) is any wall, fence, rail, post, step, booth or other structure. Mr. Khader Ali Khan has tried to make a point out of the words 'other structure' occurring in the said Section saying that any structure of whatever type it may be can be caused to be removed under S.405 without any notice. Even this submission is really to be taken with a note of caution for the reason that the term 'other structure' will have to be read in consonance with the concept of the specific

type of structures which have been mentioned in the said section. If we read the term 'other structure' used 'ejusdem generis'¹, then it is obvious that the term 'other structure' will also have to bear similar features mentioned in S. 406. The overall point to be read within the frame-work of S. 406 is that it is only when immediate action is required in public interest, such structures which have been put up as mentioned therein can be caused to be removed by the Commissioner by dispensing with giving of a notice. S. 406 of the Hyderabad Municipal Corporations Act, on the other hand, lays down the well recognised principle that the Commissioner may, by written notice, cause to be removed certain structures or fixtures which are erected or set up. If a structure is set up illegally, then under S. 406 the Commissioner is under an obligation to issue a notice to the person concerned giving him an opportunity to explain his case and thereafter if it is found that the structure has been put up unauthorisedly or illegally, it can be removed. It is a well-recognised proposition of law, which, perhaps, requires no illustration of cases that a person, who is the owner or occupier of the premises of the nature existing in this case, cannot be proceeded against in the absence of a prior notice issued by the Commissioner. In other words, the law does not permit any one to spring a surprise by way of demolition of the premises consisting of the shop of the type in question which has been in existence for a period of ten years of which the 1st petitioner is a licensee since 17-11-1990. We have no hesitation in allowing this writ appeal on the ground that no notice has been given to the petitioners. The threatened action by the Commissioner cannot derive any sustenance from any principle of law. Nevertheless, it is made clear that nothing shall preclude the Corporation to proceed against the petitioners, if they deem it fit and proper, after giving due notice to the petitioners in accordance with law.

7. The second contention, that the Municipal Corporation has removed the entire structure, is vehemently denied by the other side, stating that it was only a pillar here and there which was sought to be removed and the main structure is still intact. In view of the disputed question of fact involved in the matter, we do not want to go into this aspect of the problem at this stage. It may also be stated that it is the positive case of the 1st petitioner that he is still carrying on the business in the said premises in lieu of licence granted to him by the excise authority.

8. The learned Government Pleader for Excise appearing on behalf of respondents 1 and 2 submits during the hearing of this writ appeal that the alternative plea of the petitioners for remission may also be considered. Such a consideration at this stage of the proceedings between the parties, which is primarily concerned with the legality of the action taken by the Commissioner, will be alien to the scope of the writ petition. It would be open to the parties to have recourse to law as and when the situation demands.

9. In view of the above discussion, the Writ Appeal is allowed. In the circumstances of the case there will be no order as to costs. Advocate's fee Rs. 250/-.

10. The writ petition, viz. W. P. No. 1285/91 is also disposed of in terms of the above said judgment in W. A. No. 109/91. No costs. Advocate's fee Rs. 250/-.

11. Appeal allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com