

(1971) 04 MAD CK 0054

In the Madras High Court

Case No : C.R.C. No. 1276 of 1970 and C.R.P. No. 1267 of 1970

Excellent Publicities

APPELLANT

Vs

The Madurai Municipality

RESPONDENT

Date of Decision : 16-04-1971

Acts Referred:

Tamil Nadu District Municipalities Act, 1920 — Section 182, 183(3)

Citation : (1971) LW(Cri) 237

Hon'ble Judges : K.N. Mudaliyar, J

Bench : Single Bench

Advocate : N. Srivaismani, for the Appellant; K. Alagiriswami, (Amicus Curiae)
For Mr. S. Mohan, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.N. Mudaliyar, J.—Excellent Publicities represented by accused 2 and K.V. Ramamurthi accused 2 are the petitioners who question their conviction under S. 183 read with S. 313 of the Madras District Municipalities Act (hereinafter referred to as the Act) with the further adjunctive order directing the petitioners to pay the licence fee of Rs. 3,233.05. Briefly the facts are: The allegations against the two petitioners is that they had encroached upon the municipal read margin by fixing up advertisement boards on telegraph and telephone posts and that they had not remitted the licence fee during the period from 1st April 1968 to 31st December 1968. On behalf of the prosecution, the Revenue Officer of the Madurai Municipality and the Licence Inspector were examined as P. Ws. 1 and 2. They speak to the fact that 1899 boards, were exhibited by the petitioners and that at the rate of Rs. 2/- per menses per board, they owe a total sum of Rs. 3,235.05 along with the postage charges, after giving credit to the sum of Rs. 564/- which they have paid as licence fees.

2. The plea of the accused is that the sum does from them is Rs. 1, 370 - as licence fee. The mala argument of Mr. Srivatsamani, the learned counsel for the petitioner, is that undoubtedly the petitioners have obtained licence for exhibiting

the advertisement boards; but there is no proof of any liability as claimed by the Municipality. P.W. 1. the Revenue Officer, has stated that the Municipality, as per the resolution, has prescribed the licence fee at Rs. 2/- per mensem per board. According to him, the petitioner had 1,899 boards during the period from 1st April 1968 to 31st December 1968. A notice was leased to the petitioner on 7th March 1969 finally demanding payment. On 15th March 1969 the petitioners have received the said notice. But the petitioners have paid a sum of Rs. 564/- as licence fee, but the balance amount has not been paid. The balance along with the postage charges has come to Rs. 3236.05. The testimony of P.W. 1 has been corroborated by P.W. 2. The plea of the second petitioner is that only a sum of Rs. 1370/- was due as balance to the municipality. The learned counsel for the petitioners argued that the non-payment of the licence fee will not amount to any offence and that therefore no prosecution is competent in law and sustainable. The learned counsel took me through the relevant provisions of the Madras District Municipalities Act, Particularly Ss. 182, 183 (3), 313 (e), VII Schedule to the Act and 321 (9) and contended that a prosecution would not lie for non-payment of the licensee fee.

3. Mr. Alagiriswami, acting as Amicus Curiae, argued that under S. 306 (28) of the Act, It was open to the Council to make by laws for the prohibition and Regulation of advertisements in public streets. But in the case of Madurai Municipality, there are no such bylaws made by the Municipal Council. The Learned council emphasised the phraseology in S. 183 (2) of the Act, particularly, the words "may grant a licence" and "other structures is a public street vested in the Council". The learned counsel, Mr., Alagiriswami commented that the expression "other structures" found in S. 183 (2) of the Act would include advertisement boards on the basis of the interpretation founded on the rule of ejusdem generis. Undoubtedly, in this case a licence was granted to the petitioners. But the language of S. 183 (2), as was argued by Mr. Alagiriswami does not embody any prohibition just like Ss. 199, 209 223, 245, 255(1), 258(1), 261, 262(1), 269(1) and 270 (1) of the Act. Therefore, it stands to reason that any failure, to take out a licence under S. 183 cannot amount to an offence, and therefore, such a failure cannot be made the subject-matter of any prosecution. But if a person fails to remove the encroachment after notice, he can be prosecuted. Bat failure to take out a licence under S. 183 cannot be the subject-matter of a prosecution, for there is no offence. Mr. Alagiriswami reinforces this argument by the rationale found in Subbiah Ambalam v. Commissioner, Karaikudi Municipality and another (1956) II M.L.J. 188, wherein Somasundaram, J. held that under the scheme of licensing under the Madras District Municipalities Act there are several enumerated categories of acts for which a licence from the municipality is a pre-requisite and a person is prohibited from doing those acts without a licence. In such cases, if a licence from the municipality has not been taken and that act is done, the person who does such an acts Is liable for punishment for not taking out licence. But there are certain acts like putting up sun-shades, verandahs, balconies etc., that project over a

street which may be done by an owner subject to the terms and conditions of the licence that may be granted by the municipality. If these acts are done without obtaining a licence it is open to the municipality to issue notice for removal of the encroachment and on failure to remove the encroachment, the person can be prosecuted under S 313 (c). But, he cannot be prosecuted for not taking out licence for non-payment of licence fees". S. 388 contemplates particular act to be done only under licence or permission and if such an act is done without such licence or permission, then the executive authority may Issue notice requiring the person so doing such act not to do it. If that act is done even after the notice is served, and the person concerned does not comply with the notice then such a failure to comply with the terms of such notice as envisaged in S. 338 is made an offence and therefore punishable. But, in the instant case, the heart of the complaint is that the petitioners have failed to pay the entire licence fee, end not that there was any failure on the part of the petitioners to take out a licence. The learned counsel for the petitioners invited my attention to the terminology of S. 313 (1), and in particular, to the phraseology In S. 313(1) (c), "any requisition lawfully made upon him under or in pursuance of the provisions of any of the said sections or rules". Undoubtedly, S. 183 is included in the first column of Schedule VII. But S. 183 does not provide for the issuance of direction or requisition. Therefore, it follows that the direction to pay the licence fee is not a direction lawfully given within the meaning of S. 313 (1) (e). In other words, S. 313 cannot be called into aid by the municipality in relation to any alleged contravention of the provisions of S. 183 of the Act. Therefore, the failure on the part of the petitioners to carry out the directions given in the notice Ex. P-1 dated 7th March, 1969 cannot be construed as a direction lawfully given within the scope and ambit of S. 313 (1) (c) of the Act. Mr. Alagiriswami has cited an array of Sections in Succession to show that S. 205 (b), 218 (1), 219 (1), 210 (1), 221, 222, 223(3) (a), 226, 232, 233, 234, 235, 236, 237, 237 (4) 245 (2) 264 and 298 contain the phraseology of vital importance, namely "may by notice requiry". So also Ss. 124 (b), 238 (1), 270 and 270-c contain the important phrases "shall direct", "may by order require" and "may prohibit".

4. Both the courts below have relied on S. 321 (9), which seas as follows;

Whenever any person is convicted of an offence in respect of the failure to obtain a licence or permission or to make a registration required by the provisions of this Act of any rule or by law made under this Act the magistrate shall, in addition to any fine, which may be imposed, recover summarily and pay over to the municipal council the amount of the fee chargeable for the licence or permission or for registration; and may in his discretion also recover summarily and pay over to the council such amount, if any, as he may fix as the costs of the prosecution.

5. As already held by this Court in the case of Subbiah Ambalam, In re,(1) there is no offence in respect of the failure to obtain a licence or permission in relation to S. 183 of the Act. In my view S. 321 (9) cannot be made applicable to the act

of failure to obtain licence, since it is held to be not an offence. Mr. Alagiriswami invited my attention to the language of S. which reads:

All costs, damages, penalties compensation charges, fees other than school-fees and other sums which under this Act or any other law or rule or by law made hereunder. or by any person to the Council may if there in such provision in this Act for the recovery has demanded by bills as provided to rules Schedule IV and recover in the manner provided therein". He also drew my attention to S. 124, which runs thus;

6. The rules and tables embodied in Schedule IV shall be read as part of this chancer. Taxation and Finance Rules.

7. In S. 344, the word "fees" is mentioned and there Is no provision in this Act for recovery of fees payable for licence issued under S. 183 (2) and therefore, the said section provides for the recovery after the bills containing the demand of the fees due to the municipality in accordance with the rules in Schedule IV, are served on the licence. The relevant rules (Rr. 30 (1) and (2) of Sch. IV) would certainly apply, so far as the manner of recovery of the fees due to the municipalities. But the procedure embodied In Rule 30 (1) and Rule 30 (2) must be strictly followed, It is obvious that the said procedure has not been followed by the municipality in regard to the recovery of the fees due to the municipality. The petitioners cannot be prosecuted straight-away by means of short circuiting the procedure embodied in Rules 30(1) and (2) of Sch. IV. Who municipality must ultimately find the distraint or sufficient distraint of the defaulter's property to be impracticable. This fact can be proved only after strictly following the procedure embodied in Rules 30 (1) and (2) of Schedule IV by the municipality. Before the distraint is proved to be impracticable, the prosecution of the defaulters (petitioners)is not competent in law. I find that on the basis of the evidence on record it is not possible to hold that the petitioners are guilty of the offence under S. 183 read with S. 313 of the Act. That we petitioners are acquitted. The due, if paid, is directed to be refunded to them. The revision petition is allowed.

8. I express my deep sense of obligation for the able and excellent assistance rendered to the court by Mr. K. Alagiriswami as amicus curiae.