

(2008) 09 KAR CK 0084
In the Karnataka High Court
Case No : Writ Appeal No. 1271 of 2008

Prakash Chand Sharma

APPELLANT

Vs

The Commissioner, Bangalore Mahanagarpalike

RESPONDENT

Date of Decision : 04-09-2008

Acts Referred:

Karnataka Municipal Corporations Act, 1976 — Section 288, 288 (4)
Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 — Section 4
(2) (b)

Citation : (2009) ILR (Kar) 1 : (2009) 3 KarLJ 685 : (2009) 1 KCCR 496

Hon'ble Judges : P.D. Dinakaran, C.J.; Mohanshantanagoudar, J

Bench : Division Bench

Advocate : Janardhana G, for the Appellant; K.N. Puttegowda, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Dinakaran, C.J.—The unsuccessful writ petitioner is the appellant before us aggrieved by the order dated 30-6-2008 passed in W.P.

No. 15117/2006.

2.1 The brief facts of the case are as follows:

The appellant was a licensee of the space measuring 5"x6" situated at the corner of Kamath Restaurant, Jumma Masjid Road, Civil Station,

Bangalore, as per the proceedings of the respondent-Corporation dated 15-2-1988, for 11 months. It is his contention that the licence of shop

was renewed from year to year, but during the year 1992, the licence was not renewed at the instigation of Kamath Restaurant. Therefore, the

respondent started pressurising the appellant to vacate the place. As the appellant refused to vacate the place, the respondent-Corporation initiated

proceedings under the provisions of the Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 (for short "the Public Premises Act").

2.2 A notice was issued by the respondent u/s 4(1) of the Public Premises Act on 2-1-2003, which is alleged to have been served on the appellant

on 9-1-2003, calling upon him to show-cause why such an order of eviction should not be made, giving him an opportunity of hearing on 18-1-

2003. Admittedly, the writ appellant appeared for the enquiry and also submitted his objections. In his objections he has stated that the notice

dated 9-1-2003 is short of one day, contrary to the notice period contemplated u/s 4(2)(b) of the Public Premises Act, which stipulates that such

notice shall require all the persons concerned to show cause against the proposed order, on or before such date as specified in the notice, but not

earlier than 10 days from the date of issue of notice.

2.3 By order dated 16th June 2003, the Deputy Commissioner (Admn.), Bangalore Mahanagara Palike, Bangalore, who is the competent officer, rejected the aforesaid objection.

2.3 Subsequently, the appellant herein approached the Additional City Civil Judge, in MA No. 80/2003. The appellant Court confirmed the order

of the Deputy Commissioner by the order dated 31-8-2006.

2.4 Aggrieved by the order of the appellate authority, the appellant approached this Court in W.P. No. 15117/2006. In the said writ petition, the

appellant relied on the decision in Naveen S. Chitragar v. Secretary, Agricultural Produce Market Committee, Dharwad and Anr. 1997 (5)

Kar.L.J. 585 on the point that show-cause notice falling short of requirement as per the provisions of the Public Premises Act is invalid and the

order of eviction is not sustainable. The learned Single Judge unable to appreciate the petitioner's contentions, by order dated 30-6-2008. Hence,

the present appeal .

3. Mr. Janardhana G learned Counsel appearing for the appellant reiterated the contention raised before the government authority and the

appellate authority and also placed reliance on the decision in Wajid v. State of Karnataka ILR 1986 (kar) 3679 wherein it was held that the

impugned premises will not attract the provisions of the Public Premises Act as the same lies on the footpath.

4. Mr. K.N. Puttegowda, learned Counsel for the Corporation argued sustaining the reason that weighed with the learned Single Judge in

dismissing the writ petition.

5. We have carefully considered the submission of the counsel on both the sides.

6.1 The issue raised in Wajid's Case (Supra) is, whether or not the footpath lying within the Corporation limits can be considered as public

premises. In the said case, while considering the contention that foot-paths are not public premises as defined under the Public Premises Act, it

was held that Section 288 of the Municipal Corporation Act (for short "the Act") prevails over the Public Premises Act, which does not even

require notice before eviction.

6.2. At the outset, it is relevant to cite paragraphs-12,13 and 14 of the WAJID's Case, SUPRA:

12.1 Point No. 4: The 4th point for consideration is as to whether the areas over which the petitioners are permitted to put up bunk shops are

public premises as defined by the Public Premises Act. In this regard, the relevant provisions contained in both the enactments i.e., the Act and the

Public Premises Act, have to be looked into. In the Act, the expression ""premises"" is defined under-Section 2(28) of the Act. It is an inclusive

definition. It includes messages, buildings and lands of any tenure whether open or enclosed, whether built upon or not and whether public or

private. The expression "land" is also defined u/s 2(15) of the Act. According to it, the expression ""land"" includes land which is being built upon or

is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the

earth and rights created by law over any street. In the Public Premises Act, the expression "public premises" is defined as meaning any premises

belonging to or allotted to State Government, or taken on lease or requisitioned by or on behalf of the State Government and includes any

premises belonging to or taken on lease by or on behalf of a local authority, a company, corporation, Muzrai institution or religious institution,

under the management of the State Government, wakf under the management of the Karnataka State Board of Wakfs etc. Explanation to the

definition further makes it clear that "local authority" means, a Municipal Corporation, a town or City Municipal Council, a City Improvement Trust

Board, Taluk Development Board, a town panchayat etc. The expression "premises" is also defined by the Public Premises Act, meaning any land

or any building or hut or part of a building or hut and includes the garden, grounds and out-house, if any, appertaining to such building or hut or

part of a building or hut, and any fittings affixed to such building or hut or part of a building or hut, for the more beneficial enjoyment thereof.

Learned Counsel for the petitioners lays more stress on the words ""any land"" occurring in the definition of the word ""premises"" as contained in the

Public Premises Act, and submits that the petitioners are permitted to put up bunk shops on the land belonging to the Corporation, which is a

public premises within the meaning of that expression as defined in the Public Premises Act; hence the provisions of the Public Premises, are

attracted.

12.2. On the contrary, it is contended on behalf of the Corporation that no doubt foot-path lying within the Corporation limits, belongs to the

Corporation but it cannot be considered to be "public premises" falling within the definition of that expression, as contained in the Public Premises

Act. Even otherwise, it is submitted that Section 288 of the Act is a special provision whereas the Public Premises Act deals with all the public

premises falling under the definition of the expression; therefore Section 288 of the Act, prevails over the Public Premises Act.

12.3 There is no doubt that Section 288 of the Act when compared to the Public Premises Act, becomes a special statute and it over-rides the

provisions of the Pubic Premises Act. Section 288 of the Act, empowers the Commissioner to allow certain projections and erections. Sub-section

(1) of Section 288 of the Act, is as follows:

Section 288: Power to allow certain Projections and erections:

(1) The Commissioner may grant a licence subject to such conditions and restrictions as he may think fit to the owner or occupier of any

premises,-

(a) to put-up or continue to have verandahs, balconies, sun-shades, weather-frames and the like to project over a street; or

(b) in streets in which the constructions of arcades has been sanctioned by the Corporation to put up or continue to have an arcade; or

(c) to construct any step or drain-covering necessary for access to the premises.

It is in respect of the aforesaid matters, the power under Sub-sections (2) and (4) of Section 288 of the Act, is exercised by the Commissioner.

Sub-section (3) of Section 288 of the Act prohibits granting of licence under the aforesaid Sub-section (1), if the projection or construction is likely

to be injurious to health or cause public inconvenience, or otherwise materially interfere with the use of the road as such. Thus, Section 288 of the

Act, is intended to safeguard public health, ensure that no inconvenience is caused to the public while using the public places like road, foot-path

etc., and further to prevent any interference being caused with the use of road and thereby ensuring safety to the public in using the road. In the

instant case, it is not necessary to compare the scope and ambit of the Act with that of the Public Premises Act, as we are only concerned with the

special provisions contained in Section 288 of the Act, the intent and object of the same have already been stated above. The Public Premises Act

has a very broad spectrum as compared to Section 288 of the Act, which is a special provision dealing with very limited subjects referred to

above. Thus, Section 288 of the Act, is a special statute. Whereas Public Premises Act becomes a general statute in comparison to Section 288 of

the Act. Therefore, the provisions of Section 288 of the Act, over-ride the provisions of the Public Premises Act, as the special excludes the

general. Hence, foot-path lying within the Corporation limits cannot be considered as public premises. As such, the provisions contained in Public

Premises Act, are not attracted, as the application of those provisions is excluded.

12.4 Learned Counsel for the Corporation has placed reliance on a decision of the Supreme Court in M/s Jain Ink Manufacturing Co. v. LIC of

India and Anr. in that case, the Supreme Court was called upon to pronounce as to whether Delhi Rent Control Act, when compared to Public

Premises (Eviction of Unauthorised Occupants) Act, 1971 (Central Act No. 40/71) was or was not a special enactment. It was held by the

Supreme Court that the Central Act 40/71, as compared to the Delhi Rent Control Act, which had a very broad spectrum, was a special Act and

over-ridden the provisions of the Delhi Rent Control Act. It was also further held that Central Act No. 40/71 was enacted subsequent to the Delhi

Rent Control Act, 1958; therefore, it would naturally prevail over and over-ride the provisions of the Delhi Rent Control Act. No doubt, in

comparison to the Delhi Rent Control Act, the Central Act 40/71 which is in pari materia with the Public Premises Act concerned in the instant

case, has been held to be a special enactment, but even applying the principles enunciated by the Supreme Court in the aforesaid decision, having

regard to the scope and ambit of Section 288 of the Act, and the Public Premises Act concerned in these petitions, Section 288 of the Act,

becomes a special enactment inasmuch as it only deals with the matters enumerated in Sub-section (1). if it is held foot-paths or public places

covered by Section 288 of the Act, are "public premises", Sub-sections (2) and (4) of Section 288 of the Act, are rendered nugatory. Such an

interpretation should be avoided. The Public Premises Act, deals with all the public premises belonging to Corporations and local authorities,

companies and other institutions falling under Clause (e) of Section 2 of the Public Premises Act. As it is already pointed out, Section 288 of the

Act, specially deals with the matters which are mentioned in Clauses (a) to (e) of Sub-section (1) thereof; therefore, it is not possible to hold that

the provisions contained in the Public Premises Act, over-ride the provisions contained in Section 288 of the Act. On the contrary, the provisions

contained in Section 288 of the Act, being special provisions over-ride the provisions contained in the Public Premises Act.

12.5 For the reasons stated above, Point No. 4 is answered as follows:

Footpaths are not public premises as defined in the Public Premises Act. Consequently, the areas on which the bunk-shops in question are

permitted to be put up are not public premises. As such, the provisions of the Public Premises Act, are not attracted.

13. Placing reliance on Sub-section (5) of Section 288 of the Act, learned Counsel for the petitioners has advanced an argument that the said

provision enables the Corporation to lease the road sides and street margins vested in the Corporation for occupation on such terms and

conditions and for such period as it may fix; therefore, the bunk-shops in question are rightly permitted to be put up by the Corporation and such

permission is valid and it falls under the Sub-section (5) of Section 288 of the Act. Learned Counsel for the Corporation submits that the road

sides and street margins mentioned in Sub-section (5) of Section 288 of the Act do not cover the foot-paths; therefore that provision cannot be

held to empower the Corporation to lease out foot-paths, and such an interpretation is opposed to Section 285 of the Act, itself inasmuch as

Section 285 of the Act, directs that no one shall build any wall or erect any fence or other obstruction or projection or make any encroachment in

or over any street or any public place, the control of which is vested in the Corporation except provided by the Act. If the interpretation which is

sought to be placed by the petitioners is placed on Sub-section (5) of Section 288 of the Act, it would empower the Corporation to lease out the

foot-paths which are required to be maintained for the convenience of the public and to facilitate smooth movement of public on road and footpath.

Sub-section (5) of Section 288 of the Act, does not cover foot-paths. It is the case of the Corporation that in the places in question there are no

road margins and there are only footpaths which form part of the road; therefore, it is the case of the Corporation that Sub-section (5) of Section

288 of the Act, is not attracted. Shri Veerabhadrapa, learned Counsel for the petitioners, places reliance on a decision of this Court in C.

Hanumanthappa v. Bellary City Municipality, and submits that foot-paths are included in road sides and street margins; therefore, even though they

may form part of the road, but nevertheless they are different and distinct portions of road, as such, it is open to the Corporation to lease the same,

and accordingly, the petitioners have been permitted to put up the bunk-shops. In the aforesaid decision of this Court, it has been held that the

road margin is included in the pavement and is part of the road itself. That being so, if the road margin is treated to be part of the road itself, it is

not possible to hold that such a portion is open for lease. In this regard, it is pertinent to notice a decision of the High Court of Madras in M.A. Pal

Mohammed and Ors. v. R.K. Sadarangani and Ors. in which it has been held thus:

In spite of the common law principles evolved, by statute, leasing out of portions of a street or road being contemplated under statute, it could be

done even in England. Likewise, in so far as City of Madras is concerned, a roadside or a street margin, which forms part of a public street, could

be leased out u/s 223(5). They could never be treated as entirely different from public streets or portions thereof. But portions of a public street,

which are covered by roadway or footway, would not come within the ambit - of Section 223(5). Such portions are required for the maintenance

or user of it as a road or public highway, and hence structures cannot be put upon them to cause hindrance to public. Being fully aware of how a

public street is composed of, the right to lease out, had been confined under the Madras Act only for portions which are earmarked as roadsides

or street margins.

(Head Note-A)

Section 223(5) of the Madras City Municipal Corporation Act, is similar to Sub-section (5) of Section 288 of the Act. There is no material placed

on record to show that the three places in question over which the petitioners are permitted to put up the bunk shops are specified as road-sides or

road-margins. In the absence of any such specification and more so in the light of the stand taken by the Corporation that there are no road-sides or

road-margins or street-margins in the places in question, it is not possible to hold that the places over which the petitioners are permitted to put up

the bunk shops are either roadsides or road-margins. Hence, it is not possible to hold that the permission granted to them falls under Sub-section

(5) of Section 288 of the Act. Accordingly, the contention based upon Sub-section (5) of Section 288 of the Act, is negated.

14. In this connection, it is next contended that if the places over which the petitioners are permitted to put up bunk shops are neither road sides

nor street margins, the power under Sub-section (2) of Section 288 of the Act, cannot be exercised and in that event, the power under Sub-

section (4) of Section 288 of the Act, is not available to evict the petitioners. It is not possible to accept this contention. Footpaths are public

places. The bunk shops in question are put up on foot paths. Sub-section (2) of Section 288 of the Act, specifically, provides that the

Commissioner may grant a licence subject to such conditions and restrictions as he may think fit for any temporary construction in any street or in

any public place the control of which is vested in Corporation. Therefore the permission granted to the petitioners to put up bunk shops

temporarily for a particular period of 11 months can be held to fall under Sub-section (2) of Section 288 of the Act. Hence, power under Sub-

section (4) of Section 288 can be exercised to remove the constructions put up pursuant to the permission granted under Sub-section (2) of

Section 288 of the Act.

6.3. As is well settled, the foot-paths are Public Places. The bunk shops in question are put upon the foot-paths. In such case, Section 288(4) of

the Municipal Corporation Act would prevail over the Public Premises Act. Further Section 288(4) of the Municipal Corporation Act empowers

the Corporation to remove the bunk shops without notice. Despite the fact the licence was granted to the appellant-writ petitioner in respect of a

public place, the authorities have chosen to give notice u/s 4(2)(b) of the Public Premises Act.

6.4. It is relevant to refer to Section 4(2)(b) of the Public Premises Act, which reads as hereunder:

Section 4-Issue of notice to show cause against order of eviction (2): The notice shall-

(b) require all persons concerned, that is to say, all persons who are, or may be, in occupation of or claim interest in the public premises to show

cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than ten days from the date of

issue thereof.

6.5. As far as we are concerned, as the facts are very clear, unambiguous and explicit, we have no hesitation to hold that impugned place is a

public place. The power conferred u/s 288(4) of the Municipal Corporation Act would prevail over the power conferred u/s 4(2)(b) of the Public

premises Act in view of the clear definition of "Public Premises" u/s 2(e) of the Public Premises Act.

7. This Court in Naveen's Case (Supra) held that:

Merely because the period given for submitting explanation is less than ten days, from the material on record it disclosed that no denial of

opportunity has occurred to the disadvantage of the appellant as such since the appellant has submitted explanation and participated in enquiry,

there was no prejudice and it cannot be said that the appellant was denied opportunity to present his case effectively and on that ground rejected

the contention of the Counsel for the appellant about the deficiency.

8. It cannot be said that the power u/s 288(4) of the Municipal Corporation Act is taken away in any event as the law is well-settled. Time and

again, the Apex Court has considered cases arising in respect of the eviction from the Public Premises and has held that no body could take shelter

under Articles 14, 21 or 19(1)(g) of the Constitution of India to squat on a public premises beyond the licence period. The provision in clear terms

states as to what should happen to the projections or construction put up after the expiry of the licence period and also mentions how the

Commissioner could deal with them. When the provision itself provides how a situation has to be remedied, the authority under the Act acting

thereunder cannot be restrained by this Court on the premise that the licensee could fall back upon Articles 14 or 21 or 19(1)(g) of the

Constitution and defend the unauthorised existence of the construction or projection. The power conferred both under the Municipal Corporation

Act and the Public Premises Act are entailed to meet the public need and not to subvert it as they are made available to safeguard the public

interest and to ensure that no inconvenience is caused in using the public place or part of the same, long after the expiry of the licence.

9. That apart, in Naveen's Case (Supra), the issue was that the notice u/s 4(2) (b) of the Public Premises Act giving a hearing not earlier than 10

days was held to be bad as the party concerned was deprived of opportunity to speak his grievance, but in the instant case, it is not so. The

hearing was held on the 10th day and the petitioner also effectively participated in the enquiry and placed all the materials for consideration of the

competent authority and the competent authority considered the objection raised by him on merits. As the petitioner had effectively availed the

opportunity u/s 4(2)(b) of the Public Premises Act during the enquiry held on 18-1-2003, we do not see any grievance that is prejudicial to him.

Therefore, the technical objection raised by him against the order of eviction cannot be accepted even on merits.

10.1 At this stage, it is worthwhile to note the decision rendered by the Madurai Bench of Madras High Court in W.P. No. 689/2005 and WPMP

No. 635 to 637/2005 on 2-2-2005 in a case between The Madurai Maanagar Old Motor Spare Parts Dealers Assn. and Madurai City Municipal

Corporation, wherein it is observed as follows:

Of course, it is also a settled law that no one has the right to encroach on the public street and the hawkers or squatters have no right to occupy

any particular place on the pavement. But, if the live hood of any hawker is affected offending Articles 19(1) (g) and 21 of the Constitution of

India, the same could be regulated under Article 19(6) of the Constitution of India by the local bodies, exercising their statutory power. Allowing the right to trade without appropriate control is likely to lead to unhealthy competition and quarrel between traders and travelling public and sometimes amongst the traders themselves resulting in chaos. All public streets and roads in India vest in the State but the State holds them as trustee on behalf of the public, and the members of the public are entitled as beneficiaries to use them as a matter of right. The right of pavement hawker is thus subject to reasonable restrictions under Clause (6) of Article 19 of the Constitution of India and they cannot hold the society to ransom by squatting on the busy thoroughfare thereby paralysing all civil life. Therefore, while regretting for the proposal to lease out the roadside open space for shops, the local body are expected to take various circumstances into consideration, viz., location, width and the necessity of security measures etc. There should be a rational basis for the choice of the licensees. As policy decision should be taken in regard to the articles which should be permitted to be sold on the pavements. Unless the State and the local body take a clear decision on these issues, it may not be proper to lease out the roadside space of the public streets for traders, which would not only affect the shop owners on the street, but also the customers as well as the general public at large, particularly when the grant of lease is intended in narrow streets.

10.2. In the case of Madurai Maanagar Old Motor Spare Parts Dealers Association (Supra) the Court while disposing of the writ petition directed

the petitioner-association to remove their encroachments in front of their respective shops and also directed the Corporation to take all effective

steps to remove all encroachments in all the public roads and streets within the jurisdiction of the city.

10.3 Taking into consideration the facts, contentions raised on both sides and various precedents cited and for the reasons stated above, we are

not inclined to interfere with the order of the Single Judge confirming the order of the appellate authority.

11. Accordingly, the writ appeal fails and the same is dismissed.