

(2019) 05 KAR CK 0010

In the Karnataka High Court

Case No : Writ Petition No. 45560 Of 2018 C/W Writ Petition No. 50392 Of 2018
(Lb-Bmp)

Sipani Energy Ltd.

APPELLANT

Vs

Commissioner

RESPONDENT

Date of Decision : 27-05-2019

Acts Referred:

Kolkata Municipal Corporation Act, 1976 — Section 353, 353(1), 353(5)
Petroleum Act, 1934 — Section 31
Constitution Of India, 1950 — Article 19(6), 19(1)(g), 226, 227

Citation : (2019) 05 KAR CK 0010

Hon'ble Judges : S. Sunil Dutt Yadav, J

Bench : Single Bench

Advocate : G. Krishna Murthy, Rakesh Bhatt, K.N. Puttegowda, R.B. Sadasivappa, K.V. Mohan Kumar

Final Decision : Dismissed

Judgement

1. The petitioner - M/s. Sipani Energy Ltd., has filed W.P.No.45560/2018 under Articles 226 and 227 of the Constitution of India seeking for a declaration that the petitioner is not required to obtain a trade licence under the Karnataka Municipal Corporations Act, 1976 ('KMC Act') for dispensing "Auto-gas" at its retail out-let in Bengaluru, and, as a consequential remedy has sought for issuance of writ of certiorari to quash the order bearing No.A.Vy.(Chi.Pe)/Pi.R/209/ 2017-18 dated 20.09.2018 passed by the Medical Officer of Health, Bruhat Bengaluru Mahanagara Palike (BBMP). In the alternate, the petitioner has sought for issuance of a writ of mandamus to the second respondent directing consideration of its application for issuance of trade licence without insistence on first obtaining No Objection Certificates ('NOC') from certain third parties, including neighbours.

2. The petitioner, M/s.Sipani Energy Ltd., is a registered Company engaged in the business of manufacturing, stocking and distribution of automobile, engineering

and energy products. The petitioner is also stated to be a distribution agent and dealer for M/s. Total Oil India Pvt. Ltd for Liquefied Petroleum Gas ("LPG"). For storage of Auto LPG at the premises, NOC was sought from the Commissioner of Police, Bengaluru City, who in turn sought for NOCs from various other authorities including the second respondent. Although the Commissioner of Police and various other Authorities had granted the requisite NOCs in May and June, 2016, the petitioner claims that on 31.01.2017, the second respondent issued notice to the petitioner highlighting the requirement to obtain trade licence from BBMP. Accordingly, the petitioner applied for requisite trade licence from the second respondent-Health Officer, BBMP. The petitioner submits that instead of issuing the trade licence, the second respondent issued an endorsement dated 13.03.2017 stating that Shri Chapalamma and Shri Plegamma Temple Development Trust has filed a complaint against petitioner's business and asked the petitioner to obtain an NOC from the complainants as a pre-condition for issuance of trade licence.

3. The petitioner replied highlighting that it had obtained permissions/sanctions from all relevant Government Departments and additionally submitted NOCs from neighbours on three sides and had complied with all requisite precautionary measures. Hence, the petitioner requested that the trade licence be issued without insisting on obtaining the NOCs from the complainant - temple trust. Through further communication dated 31.07.2017 by the second respondent, the petitioner was not only specifically asked to obtain NOC from Shri Chapalamma and Shri Plegamma Temple Development Trust, but was also informed that the petitioner's business would be closed in case of failure to obtain the same. Further, similar notices were sent to the petitioner on 31.07.2017 (Annexure-K) and 10.11.2017 (Annexure-L) requiring NOCs from the aforementioned third parties within seven days of notice, to which the petitioner submits that it had replied stating that its property was commercial in nature which did not require consent of neighbours for issuance of trade licence. The petitioner also contends that it wrote to the second respondent highlighting that no temple stood at the site as claimed by the respondent and that there were merely two small 'stone mantapa' with no regular pooja taking place. The petitioner further contends that the complainants are not owners of the temple, but merely using their political influence to ensure that no licence is issued to the petitioner.

4. On 20.09.2018, the petitioner was served with an order at Annexure-Q by the second respondent stating that due to non-obtainment of NOC from the complainant-temple trust, it must stop business within 24 hours from receipt of notice, which was on 26.09.2018.

5. After having heard learned counsel for both the sides, the following points arise for consideration:-

(i) "Whether the petitioner is required to obtain trade licence in terms of Section 353 read with Schedule X of the KMC Act?

(ii) "Whether neighbours' consent is required for obtaining trade licence and can be insisted upon by the BBMP Authorities as being mandatory?"

Re. Point No.1: Requirement of obtaining trade licence

6. A perusal of the scheme of the Act makes it clear that the state legislature intends to regulate activities, which are hazardous, risk public health and safety, or have the possibility of disturbing peace and tranquility. Towards this end, the Karnataka Municipal Corporations Act, 1976 per Section 353(1) requires that all persons engaging in activities mentioned under Schedule X be required to apply for a licence.

7. Certain entries of Schedule X which specify relevant activities requiring trade licence are as follows:-

"Gas - Storing, packing, pressing, cleansing, preparing or manufacturing by any process whatever"; and

"Petroleum Products - Storing, packing, pressing, cleansing, preparing or manufacturing by any process whatever in quantities not exceeding six gallons, provided that no licence shall be required for storing petroleum in accordance with the provisions of the Petroleum Act, 1934 (Central Act XXX of 1934), or the rules issued or the notifications published under the Act".

8. The scheme of the Schedule makes it clear that the Legislature has carved very limited exceptions, including to certain activities concerning petroleum under the Petroleum Act, 1934.

9. The petitioner contends by relying on the latter portion of the Entry relating to petroleum products, that once permission is obtained under the Petroleum Act, 1934 or Rules or Notifications published under the Act, the question of insisting on obtaining permission under the KMC Act does not arise. Further, the petitioner highlights that he has obtained various licences and NOCs as mentioned under, which obviate the requirement of a trade licence from the respondents:-

(i) NOC from Health Officer, BBMP for the purpose of storage (Annexure-D dated 21.05.2016).

(ii) NOC for the purpose of storage of Auto-LPG obtained from Commissioner of Police (Annexure-E dated 14.06.2016).

(iii) Licence to store and dispense Liquefied Petroleum Gas in Form No.V (Annexure-T to the rejoinder) issued under Chapter-V of The Static Mobile Pressure Vessel (Unfired) Rules, 2016.

10. The BBMP, per contra, contends that mere obtainment of licences under other statutory regulations cannot do away with the statutory requirements under the KMC Act, which is required for the purpose of trading. Further, the learned counsel for respondents highlights that KMC Act is a self contained code and must be construed accordingly, and that power is vested with the

Commissioner of BBMP under Section 353 (5) of the KMC Act to refuse grant of trade licence, if nuisance is likely to be caused in the neighbourhood.

11. Further, the learned counsel Sri R.B. Sadasivappa appearing for the petitioner in W.P.No.50392/2018 has contended that there is a Community Centre Primary School and Maiya Multi-Specialty Hospital apart from the temple and permitting continuance of an LPG station without obtaining trade licence is dangerous and impermissible.

12. It is clear that the Petroleum Act, 1934 and the KMC Act have distinct objectives and purposes and are intended to operate in different fields. When there is an overlap, a harmonious interpretation is to be resorted to avoid any conflict. In fact, Section 31 of the Petroleum Act, 1934 confers power on the Central Government to limit the operation of other enactments or restrict exercise of power conferred upon a local authority in so far as it relates to 'transport or storage of petroleum.'

13. The petitioner places reliance on the judgment in the case of Indian Oil Corporation Ltd. and Ors. v. Executive Officer and Ors., reported in (1998) 9 SCC 384 whereby, the Apex Court had held that a notification issued by the Central Government excluding operation of certain provisions mandating licence under the Bombay Municipal Corporation by way of power vested under Section 31 of the Petroleum Act, 1934 would subordinate the state legislation and obviate the requirement for a licence from the local municipal corporation. Similarly, the petitioner also highlights similar rulings by the High Court of Bombay in the case of The Municipal Corporation of Greater Bombay v. Bharat Petroleum Corporation Limited and Ors., reported in AIR 1993 Bom 54 and the judgment in the case of Municipal Committee v. Meeri Mal and Another reported in (1962) ILR 2 Punjab and Haryana 1.

14. At the outset, it would be pertinent to highlight that all three cases have different material facts than in the present case. Here, the petitioners have not placed before the Court any material to indicate that any notification was issued by the Central Government under Section 31 of the Petroleum Act, 1934 excluding or restricting the operation of KMC Act. The necessity of such notification for subordination of the state legislation and extenuation of local municipal regulation is obvious from the observation made by the Apex Court in the case of Indian Oil Corporation Ltd. and Ors. (supra). The relevant portion of the said decision is extracted hereinbelow:-

"4. Now in the two cases, which engage our attention, notifications respectively stand issued by the Central Government, in exercise of power under Section 31 of the Petroleum Act whereas, in contrast, in Lalji Mulji Case (Supra) the positive finding recorded by the High Court was that the commodity on which the Corporation had taken action was outside the scope of the notification. In the instant case undeniably the commodities are within the scope of the notifications."

15. Hence, the issue here must be resolved solely upon interpretation of the KMC Act, and not as an issue of repugnancy or conflict between enactments. Though it is contended by respondents that the exemption provided under Schedule X is very narrow and would exempt requirement of licence only for limited purposes of storage and not vending or sale, the alternate submission that even otherwise licence is required for retailing of LPG by virtue of being covered in Entry 'Gas' is with sufficient force.

16. The petitioners contend that the entry of "Petroleum Products" is specific, and that of "Gas" is general, and when it has been exempted under the specific entry, it would necessarily also stand excluded from the general entry. The petitioner has relied on the judgment of the Apex Court on this point in the case of Commercial Tax Officer, Rajasthan v. Binani Cements Limited and Another reported in (2014) 8 SCC 319.

17. However, such classification of the two entries, in the present factual matrix, cannot be accepted. It is clear that "Gas" includes within its ambit other non-petroleum gases like Hydrogen and Helium, and the entry of "Petroleum Products" would include non-gas based products like diesel and kerosene. The Entry 'Gas' is hence not a subset of 'petroleum products' and vice-versa. There can be overlaps, and mere inclusion under one entry cannot by itself be grounds for exclusion from all other entries. The principle laid down by the Apex Court cannot be applied to the factual matrix in the present case.

18. It is settled that the purpose and the frame of an enactment must be kept in mind whilst interpreting its provisions. The power to grant/refuse licence vested in the Commissioner as per Section 353 of the KMC Act is wide and trade license can be refused where the proposed activity is likely to cause nuisance. In the present factual matrix, "LPG" shares characteristics of both 'Gas' and 'Petroleum Products'. Considering the hazardous nature of LPG and the vice sought to be countered by the KMC Act, it would defeat the scheme and purpose of the enactment if merely upon exhibiting some features of an exempted commodity (of 'Petroleum Products'), other regulated characteristics (of 'Gas') are overlooked. Hence, the petitioners cannot be exempted from the requirement of obtaining trade licence.

19. Accordingly, the point for consideration that has been raised is answered in the affirmative and accordingly the petitioner is required to obtain trade licence from the respondent - BBMP for vending of "Autogas".

20. As far as the respondents' contention that the petitioner has not obtained separate power licence and hence the order directing closure of business is concerned, it is apparent that the scheme i.e., 'Suvarna Arogya Paravanige' (SAP) envisages a comprehensive application for issuance of trade licence, which includes grant of a power licence. This becomes clear on a perusal of Annexure-R7 of the statement of objections filed by the respondent-BBMP. Accordingly, the said contention does not require any further consideration.

Re. Issue 2: Requirement of NOC

21. The petitioner contends that its property comes within 'Commercial Axes Zone' as per the Revised Master Plan 2015 and that neighbours' consent is not required for obtaining licence when the property is located in such a commercial zone. Further, as per the Zoning and Landuse Regulations (as amended by Notification No.UDD 93 MNJ 2008 dated 02.03.2009), "fuel stations and pumps, LPG storage" is permissible under Entry 10 of 'C2' relating to commercial uses. Finally, the petitioner highlights that the action initiated by respondents is mala fide and at the instance of locally influential persons.

22. Per contra, learned counsel for the respondents contends that consent from neighbouring property owners is essential and that the trade licence ought to have been obtained prior to commencement of the business, failing which, the respondent was justified in directing closure of the petitioner's business.

23. The Chapalamma and Sri Plegamma Devasthanagala Abhivrudhi Sangha Trust has filed W.P.No.50392/2018 and has sought for the issuance of a writ of mandamus to the respondent - BBMP to consider the complaint submitted to it and to direct the petitioner in W.P.No.45560/2018 to stop the business.

24. Further, learned counsel for the petitioner in W.P.No.50392/2018 highlights various concerns of public safety and possibility of nuisance in operation of an "Auto-gas" station at the present premises.

25. It is not in dispute that the property where the retail outlet has been established is situated on Commercial Axes. Copy of the sanctioned plan at Annexure-R describes the land use zone as "Residential (Main), Commercial Axes". The area of the plot is 748.53 sq. mtrs, and it faces 10th Main, which is a 100 ft. road, which is clear from a perusal of sketch at Annexure R1 enclosed with the statement of objections filed on behalf of the respondent-BBMP.

26. The Revised Master Plan-2015 which incorporates 'Zoning of landuse and regulations' (approved by Government vide G.O.No.UDD 540 BEM AA SE 2004 dated 22.06.2007) provides that the usage as provided under the category of C-2 which includes 'fuel stations and pumps and LPG storage' is permissible in the case of commercial axes. The criteria under Regulation 4.6.2 of the Revised Master Plan-2015 is satisfied and hence, the proposed outlet of the petitioner is permissible in the current location.

27. While issuing a writ of mandamus, the Court is required to be satisfied that the petitioner has made out a legal right that is enforceable as against the statutory authority.

28. It is undisputed that the petitioner has a right that his application for trade licence be considered in accordance with law. The respondent - BBMP has however taken a stand that the application of the petitioner cannot be considered unless NOC is obtained from the complainant, who claims to manage and administer the temple adjacent to the petitioner's site. Without first holding that

the respondents' insistence on obtaining of NOC from third parties, is impermissible, the question of issuing a writ of mandamus to consider the application of the petitioner does not arise.

29. It is on record that the petitioner has obtained 'No Objection' from the neighbours on three sides. It is only the complainant-temple trust who, claiming to be a neighbour, has objected to the same on grounds of safety.

30. The statutory provision governing the grant of 'trade licences' is contained in Sections 353 and 354 of the KMC Act. The only restriction regarding grant of licence is under Section 353(5), where the Commissioner may "refuse to grant such licence if it is likely to cause nuisance in the neighbourhood". Such restriction is traceable to Article 19(6) of the Constitution of India, which provides for imposing restrictions on grounds of 'interests of the general public' as regards the fundamental right to carry on occupation, trade or business under Article 19(1)(g) of the Constitution of India. Any restriction or condition upon grant of licence or refusal on grounds of likelihood to cause nuisance, is open to judicial scrutiny.

31. It is essential to note that the respondent-BBMP has been unable to provide any statutory provision or delegated legislation which mandates obtainment of NOCs from private third parties, like applicants' neighbours.

32. Even under the Scheme "Suvarna Arogya Paravanige" which provides for obtaining trade licences, the requirement of NOC from the neighbour is applicable only in case of commercial activities in residential zones and not to other circumstances, like at present. As observed supra in para 26, the proposed activity of the petitioner is permissible.

33. A Division Bench of this court in W.A. No. 2570/2009 c/w W.A.No.9574/2010 (LB-BMP) vide judgment dated 25.01.2011 noted that even if there were to be a specific procedural requirement of obtaining an NOC from private third parties, the same cannot be insisted in all circumstances.

34. The insistence on obtaining an NOC from the temple trust and refusal to consider the application of the petitioner solely on such ground is impermissible in the absence of any statutory requirement. Although the non-obtainment of NOC cannot by itself be a ground for refusal to consider petitioner's application for trade licence, objection from neighbours or inability of applicant to source NOCs from them by an applicant can be taken into account by the appropriate authority whilst considering the likelihood of nuisance in the neighbourhood. Any such determination of likelihood of nuisance must be done by appropriate authorities themselves by due application of mind.

35. Similar criticisms on insistence of NOCs by Government Authorities have been voiced by various courts across the country, including the High Court of Kerala in the case of Faseela v. The Chief Town Planner in W.P.(C) No.856/2014 (F) vide order dated 17.01.2014 whereby, the Court struck down a requirement

for obtainment of NOCs from neighbours for vending LPG, the relevant portion of which is extracted hereinbelow:-

"3..... To a pointed question as to whether any statutory provision or rule requires such a NOC to be obtained, the answer is that there is no such statutory provision. It is also not in dispute that the petitioner has complied with the requirements of all statutory provisions. The above being the position, I do not find any justification for insisting that the petitioner should obtain NOCs from the neighbouring property owners."

(emphasis supplied)

36. Further, this Court in the case of K. Lakshmana v. The Joint Commissioner (West), BBMP and Ors., (W.P.No.1639/ 2015) vide order dated 10.09.2015 whilst striking down an order of the BBMP rejecting a trade licence application for non-obtainment of NOC from the Karnataka State Pollution Control Board, interpreted Section 353(5) of the Karnataka Municipal Corporations Act, 1976 and noted as follows:-

"11. A bare perusal of the Section clearly reveals that the Commissioner is empowered to impose certain restrictions and conditions while granting a licence. Moreover, he can refuse to grant a licence, if the trade activity is causing nuisance in the neighbourhood. However, in the present case, the application for licence has been rejected on the ground that the petitioner needs to produce a "NOC" from the Board. In fact, the said application has been rejected by placing an onerous condition upon the petitioner. Therefore, the condition mentioned in the impugned order cannot be brought within the ambit of Section 353 (5) of the Act. Hence, the respondent cannot take refuge under Section 353 (5) of the Act in order to lend legitimacy, or legal validity to the impugned order.

12. Needless to say, the condition imposed by the BBMP. upon the petitioner is not only onerous one, but it is also absolutely arbitrary, unfair, and unreasonable. For, the condition is unsupported by Law."

37. In light of the discussion as above, the point for consideration No.2 is answered in the negative. Accordingly, the respondent No.2 is directed to consider afresh the application for trade licence filed by the petitioner in W.P. No.45560/2018 at Annexure-G1, in accordance with law in light of the observations made above. The order at 'Annexure-Q' dated 20.09.2018 is set aside.

38. W.P.No.50392/2018 is dismissed.

39. However, it is made clear that the respondent - BBMP while considering the application of the petitioner at Annexure G1 is entitled to take note of the objections raised by the complainant-temple trust as per law and strictly in light of the observations made above. As regards the requirement of obtaining trade licence by the petitioner, in light of the discussion and finding at point No.1 for consideration, it is held that the petitioner is required to obtain the trade licence.