

(1985) 12 KAR CK 0013

In the Karnataka High Court

Case No : W.P. Nos. 9915 to 9977/85. 11th, 12th, 13th

Wajid, Y.S. and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 16-12-1985

Acts Referred:

Karnataka Municipal Corporation Act, 1976 — Section 288

Citation : (1986) 2 KarLJ 217

Hon'ble Judges : K. A. Swamy, J

Judgement

K.A. Swami, J.-These petitions are filed under Articles 226 and 227 of the Constitution. In Writ Petitions 9915 to 9977 of 1985, the petitioners have sought for the following reliefs with reference to the shops mentioned in the schedule to the petitions:

"(ii) to restrain the respondents from demolishing the Bunk Shops belongs to the petitioners, as described in the Schedule by issue of writ of mandamus or any other suitable writ or order or direction;

(iii) issue a writ of mandamus restraining the respondents from evicting the petitioners from the schedule shops till alternative accommodations provided to them in the new building in the City Market;

(iv) To declare that the respondents are estopped from the evicting the petitioners without following the due courses of law, and to protect the right of petitioners under Article 14, 19(1) and 300-A of the Constitution.

(v) and to restrain the respondents from interfering with the peaceful possession and enjoyment of the Schedule Shops and from demolishing the same, and to grant such other reliefs as the court deems fit in the interest of justice."

SCHEDULE (1) The shops of petitioners on front side of Victoria Hospital on Mysore Road, Bangalore.

Shop Nos. 13, 48, 20, 6, 50, 16, 17, 36, 33, 29, 12, 7, 15, 34, 2, 9, 8, 21,

58,57,47,3,14.

(2) The shops of Petitioners in Victoria Hospital by the side of underground to Fort on K.R. Road, Bangalore City.

Shop Nos. 13, 17, 29, 37, 9, 8, 21, 80, 63, 69, 30, 48, 3, 19, 61, 49, 32, 54, 31, 50, 22, 23, 27, 72, 18, 25, 35.

62, 36, 14, 44, 53, 43, 42.

(3) The shops of petitioners in S.J.P. Road opposite to Chandra Bhavan, Bangalore City.

23, 55, 11, 10, 28,7."

2. Similarly, in writ petitions 11973 to 12053/85 the petitioners have sought for the following reliefs with reference to the shops mentioned in the schedule to the petitions:

"ii) to restrain the respondents demolishing Bunk Shops belongs to the petitioners, as described in the schedule by issue of writ of mandamus or any other suitable writ or order or direction.

iii) Issue of writ of mandamus, restraining the respondents from evicting the petitioners from the schedule shops till alternative accommodations provided to them in the new building in the city market.

iv) To declare that the respondents are estopped from the evicting the petitioners without following the due course of law, and to protect the rights of petitioners under Article 14, 19(1) and 300-A of the Constitution.

v) and to restrain the respondents from interfering with the peaceful possession and enjoyment of the schedule shops and from demolishing the same, and to grant such other relief as this court deems fit in the interest of justice.

vi) to quash Sec. 288 (4) as violative of Art. 14, 21, and 19(1)(g) of the Constitution by issue of writ of mandamus or any other suitable writ or order."

SCHEDULE (1) The shops of petitioners on front side of Victoria Hospital on Mysore Road, Bangalore-2.

Shop Nos. 86, 90, 61, 30, 43, 37, 76, 71, 54, 72, 78, 77, 83, 32, 4 and 60.

2) Shops of petitioners in K. R. Road: 7, 71, 15, 40, 55, 46, 68, 31, 77, 73, 41, 58, 51, 79, 47, 24, 65, 57, 16, 70, 60, 5, 12, 4, 67, 59, 38, 10, 56, 1, 45 and 11.

3) S. J. R. Road: 7, 38, 30, 51,29, 15, 16, 26, 25, 31, 74, 5, 23. 1,4, 22, 24, 16, 17, 28, 39, 9, 36, 10, 11, 21, 49,57, 15,42, 14, 12,9."

3. Thus, in the second batch of writ petitions, there is an additional prayer made by the petitioners to declare sub-sec. (4) of Sec. 288 of the Karnataka Municipal Corporation Act, 1976 (hereinafter referred to as the "Act") as unconstitutional

being violative of Articles 14, 21 and 19(1)(g) of the Constitution.

4. The petitioners are petty traders. They are carrying on business of vending vegetables, fruits and selling ready-made garments, stain-less steel articles, old clothes, artificial ornaments, hosiery goods. Some of them are also running Beedi stalls. They claim that they belong to weaker sections of the people. They are carrying on business in Bunk shops, which are situated at three places: (i) on the foot-path between Victoria Hospital Old main gate and the Corporation sub-way and also (ii) between Old Fort and sub-way near Dental college corner on K.R. Road; and (iii) in front of Chandra Bhavan Lodge by the side of the taxi stand on S.J.P. Road, Bangalore.

5.1) The case of the petitioners is that they were carrying on petty business on the foot-path in front of the City Market; that in order to provide places for putting up bunk shops by the petitioners, the State Government in the presence of the Commissioner of the Corporation of the City of Bangalore considered the subject on 22nd July, 1982 and passed an order bearing No. HUD 234 MNY 82 produced an Annexure-A directing the Corporation to provide places for putting up bunk shops by the petitioners and also grant licence for running the same. It is necessary to re-produce the order (Annexure-A) of the State Government, which is as follows:

"GOVERNMENT OF KARNATAKA

Karnataka Govt. Secretariat,

Vishveshwaraiah Centre Mini

Tower, Bangalore,

dt. 22nd July, 1982.

R. Stanley Joseph,

Under Secretary to Government,

Housing & Urban Development Department.

D.O. No. HUD 234 MNY 82

Dear Sir,

Sub: Construction of Temporary Bunk shops (with wooden frame and tin sheet roof) for all the persons who are at present having bunk shops on the footpaths etc.

I am desired to forward herewith a copy of Note No. M/HUD/Note 353/ 82, dated 13th July, 1982, from the Hon''ble Minister for Housing and Urban Development on the subject mentioned, and to request you kindly to take necessary immediate action to implement the two decisions referred to in the note and send a compliance report to Government indicating the action taken within a

fortnight, positively.

This matter may please be treated on top priority basis.

With regards.

Yours sincerely,

Sd.

Shri S.M. Pattanaik,

Commissioner,

City Corporation,

Bangalore.

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Copy of the Notice No. M/HUD/ Note-353/82 dated 13-7-1982 from the Minister for HUD addressed to Secretary HUD Dept.

A meeting was held in the Chambers of the Hon"ble Chief Minister on 13-6-1982 Mysore, Sri F.M. Khan, M.P. The Commissioner, Bangalore City Corporation and Sri K.P. Panday, Add I. Secretary to CM. were present in this meeting, the following subjects were discussed and decisions taken.

1(a) After detailed discussion, it was decided to construct temporary bunk shops (with wooden frame and tin sheet roof) for all the persons who are at present having bunk shops on the foot paths situated (1) in front of Victoria Hospital i.e. between the staircase room of our sub-way (situated in front of Dental Hospital) and the Victoria hospital main gate and (ii) by the side of the foot-path situated in front of Chandra Bhavan lodge, it was further decided that before providing such wooden cabins to the existing stall holders each of them will be asked to give an undertaking that he will vacate the place immediately after he is allotted some place in the proposed new building for City Market.

2. It was further decided that a small portion of Osman Khan Drain (just adjoining N.R. Road) should be covered up and the same should be given to various persons, who are having at present unauthorised shops inside Mothinagar and Bomboo Bazaar Areas. However, the Commissioner, pointed out that this would pose some danger to the people who are having their houses and shops by the side of this drain, as many a time, during the rainy season this drain overflows, it was finally decided to go ahead with this work.

The Commissioner, Bangalore City Corporation may be advised to implement the above two decisions, very early and report compliance to the Government in H.U.D. Department.

Sd. Dharam Singh,

Minister for Housing and Urban Development."

5.2) It is the further case of the petitioners that pursuant to the aforesaid order, the Corporation of the City of Bangalore obtained an undertaking from each one of the petitioners and permitted them to put up bunk shops and granted temporary licences on 1-10-1982 for conducting business in the bunk shops in question; that as per the assurance contained in the Government Order (Annexure-A) read with condition No. 11 of temporary licences, the petitioners are entitled to continue their business in the Bunk shops in question until they are provided with alternate accommodation in the new City Market or elsewhere; that acting upon the assurance contained in the Government Order (Annexure-A) and Condition No. 11 of the licence, the petitioners have put up the bunk shops and have raised loans from various financial institutions and invested the same for running business in the bunk shops, therefore it is not open to the Corporation to evict them by demolishing the bunk shops and refuse to renew the licences; that the licences have not been renewed after the expiry of eleven months from 1-10-1982; that the places where the bunk shops are allowed to be put up, are not foot-paths and they are road margins; that the shops do not at all interfere with the movement of public on the foot-path; that the petitioners, having lawfully come in possession of the places given to them to put up bunk shops and having been permitted to carry on the business under the temporary licence granted to them cannot at all be evicted by the Corporation; that the road margins, where the bunk shops are situated, are "public premises" as defined in the Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 (hereinafter referred to as the "Public Premises Act"); that no proceeding under the Public Premises Act is initiated; that the respondents are estopped from evicting the petitioners inasmuch as the petitioners acting upon the representation made to them as per Annexure-A and the conditions of licence have altered their position to their detriment and have invested huge amount by raising loans; that at any rate, the petitioners cannot be evicted by overnight as they are running business in the bunk shops; and they are entitled to reasonable time for vacating; that the order of the State Government comprised in Annexure-A is the one passed under Sec. 95 of the Act; therefore, the Corporation is bound by it and as such, it is not open to it to act contrary to the Said order; that at the time when the State Government passed the order as per Annexure-A the Corporation of the City of Bangalore was under the control of the Administrator and it was he who took the decision to grant licences; therefore it was a decision of the Corporation itself; therefore, it is not now open to the Corporation to act contrary to the decision of the Administrator. In addition to these contentions, in Writ Petitions 11973 to 12053/85, the petitioners have also raised a contention that sub-section (4) of Sec. 288 of the Act, is unconstitutional being violative of Articles 14, 21 and 19(1)(g) of the Constitution.

5.3) The Corporation of the City of Bangalore has filed the statement of objections. The case of the Corporation is that no proceeding whatsoever for

providing temporary or permanent accommodation to the petitioners to enable them to put up bunk shops for conducting business, was pending before the Corporation and no such proceeding was also called for by the State Government from the Corporation; that the order of the State Government comprised in Annexure-A does not fall under Sec. 95 of the Act; that the order of the State Government also does not purport to have been passed under any of the provisions of the Act; that the Corporation was not superseded during the relevant point of time; that the Administrator was appointed not because of the supersession of the Corporation but because of the fact that the term of the Corporators has expired and the elections could not be held in time; that the Administrator appointed under such circumstances, does not enjoy all the powers of the Corporation and the property of the Corporation also does not vest in him; therefore, the contention of the petitioners that the decision of the Administrator, in effect was that of the Corporation; as such it is not open to the Corporation to take any other decision is not valid in law; that as per the terms of the licence the petitioners are required to vacate the places on the expiry of 11 months; that the terms of the licences cannot be operative beyond the period for which the licenses are granted; that there is no estoppel against the respondent-Corporation inasmuch as no representation as claimed by the petitioners was made by the Corporation except issuing the temporary licences on obtaining an undertaking from each one of the petitioners; that a reading of temporary licences and the undertakings together would make it clear that the petitioners cannot claim to occupy the bunk shops beyond the period mentioned in the licences; that the bunk shops in question are on the foot-path itself; that existence of bunk shops is causing great inconvenience to the movement of the public on the footpath; that the petitioners have no right to occupy the foot-path; that having regard to Sec. 285 of the Act, foot-path cannot at all be used for any other purpose much less for the purpose of running bunk shops; that subsection(4) of Sec. 288 of the Act, is valid and it is not violative of Articles 14, 21 and 19(1)(g) of the Constitution; that the petitioners are not entitled to the reliefs sought for by them.

6. Having regard to the aforesaid contentions, the following points arise for consideration:

(1) Whether there was a proceeding pending before the Corporation of the City of Bangalore under Sec. 95 of the Act, to provide a place to the petitioners to put up bunk shops in the Corporation limits ?

(2) Whether the Government Order dated 22nd July, 1982 bearing No. HUD 234 MNY 82, produced as Annexure-A falls under Sec. 95 of the Act ?

(3) Whether by reason of the Government Order dated 22nd July, 1982 (Annexure-A); and the undertaking given by the petitioners read with Condition No. 11 of the Licenses, the Corporation of the City of Bangalore is estopped from evicting the petitioners from the bunk shops in question ?

(4) Whether the areas on which the petitioners are permitted to put up the bunk shops are "Public Premises" attracting the provisions of the Public Premises Act ?

(5) Whether the areas on which the bunk shops are permitted to be put up pursuant to the Government Order dated 22nd July, 1982 (Annexure-A), are foot-paths ?

(6) If the answer to Point No. (5) is in the affirmative, whether it is open to the Corporation to permit the petitioners to put up bunk shops on the foot-paths ?

(7) Whether sub-section (4) of Section 288 of the Act, is unconstitutional ?

(8) Whether the petitioners ought to have been served with notice to show cause and afforded an opportunity of hearing before directing them to vacate the bunk shops.

7. Before taking up for consideration the aforesaid points, it is necessary to deal with one another contention raised by the petitioners. It is contended on behalf of the petitioners that at the relevant point of time when the order as per Annexure-A was passed by the State Government, the Corporation was superseded and an Administrator was appointed under Section 100 of the Act; therefore, the Administrator was fully empowered to deal with the matter and the State Government was competent to issue a direction to the Administrator during the period of supersession; hence, the order-Annexure "A" is binding upon the Corporation. This contention is resisted by the Corporation. It has produced the orders passed by the State Government appointing an Administrator, as Annexures-5 and 6. From these orders, it is clear that the Corporation was not superseded. An Administrator was appointed because of the fact that the elections to the Corporation could not be held. The appointment was under Section 47(b) of the repealed enactment which was continued under the provisions of the Act, and subsequently, was revoked on the constitution of the Corporation. Thus, the Administrator who was functioning at the relevant point of time was not the one who was appointed on superseding the Corporation. Therefore, no power was available to the Government to issue directions which it could issue, if there was superseding of the Corporation. Therefore, having regard to Annexures 5 and 6, the contention cannot at all be accepted. It is accordingly rejected.

8.1) Point Nos. (5) and (6) are crucial points. They can be considered together. Findings on these points will have a great bearing on the other points. Therefore, these points are taken up for consideration first.

8.2) POINTS (5) & (6): It is the case of the Corporation that the bunk shops in question are situated on the footpaths between Victoria Hospital Old-main gate and the Corporation sub-way; between old fort and sub-way near Dental College corners on K.R. road; and in front of the Chandra Bhavan Lodge, by the side of Taxi Stand on S.J.P. Road, Bangalore. The contention of the petitioners in this regard is that the places where the bunk shops are situated are not the footpaths

but they are the road-margins; therefore, the Corporation is not right in proceeding to evict them on the ground that the bunk shops are situated on the foot-paths. The petitioners have also given the measurements of the areas as follows:

"The bunk shops opposite to Victoria Hospital are not on the footpath but on the road margin. The footpath is about 20 to 24 feet, is not obstructed. The bunk shops in K.R. Road adjoining Dental Hospital Compound are also on the road margin. The footpath having the width of 19 feet is free and not encroached. The bunk shops in front of Chandrabhavan Lodge are between S.J.P. Road and the Taxi Stand. Hence, the question of obstructing the free movement does not arise. No inconvenience will be caused to public or to other persons who come to the market. In other words, these shops are part of market area and cannot be regarded as nuisance to public."

8.3) On the contrary, the Corporation, in its Statement of objections filed on 11-9-1985 in Writ petitions 11973 to 12053 of 1985, at paras 2, 3 and 4 has stated thus:

"2. This respondent granted 257 temporary licences in the month of September, 1982 for carrying on petty trade in Bunk shops of various sizes on the foot-paths of road adjacent to Victoria Hospital, Dental hospital, Krishnarajendra Market and Chandra Bhavan Lodge at Silver Jubilee park road. There are no "road-sides" or "street margins" in the said roads. The licences were temporary in character and were valid only for a limited period of 11 months. In terms of the said licences, the licence-holders were required to pay Rs. 50/- per month to this respondent as licence fee. This respondent has not collected any fee for the period beyond the 11 months. The averments that the petitioners were orally authorised in the beginning by the Administrator, and the State of Karnataka in the year 1982 had arrived at a scheme and issued directions to issue licence to these petitioners and others as a temporary measure on the undertaking that they would vacate the premises immediately after they are allotted some place in the new building of the City Market is factually incorrect and are not borne out from the records. The terms under which the petitioners were permitted to put up bunk shops are found in the licences granted by this respondent. Clause 11 of the licence provides for premature termination of licence on being provided with alternative accommodation, if available.

3. After the expiry of the licence period this respondent has not renewed the licence taking into consideration several factors including the inconvenience caused to the general public since the bunk-shops erected by the licence holders on the foot-paths were obstructing traffic causing great inconvenience to the pedestrians who are entitled to use the foot-paths. In fact, a writ petition has been filed before this Hon"ble court challenging the decision of this respondent in issuing licences for construction of bunk-shops on foot-paths to carry on petty trades. This Hon"ble Court in W.P. No. 37627 of 1982 has granted an ad-interim order directing this respondent not to implement the decision contained in the

order dated 22-7-1982 passed by the first respondent.

4. The area in which the aforesaid bunk shops are put up is heavily congested. The density of pedestrains and the number of vehicles plying on the roads leading to City Market area are the highest in the City because of the situation of Victoria Hospital, Vani Vilas Hospital, Dental College, S.L.N. College, City Market, Cinema Complex, Kalasipalyam Bus Stand and other public bus terminus, Kalasipalyam wholesale market yard and several other public utility buildings. For easy movement of pedestrains subways have been provided. The continuous existence of the bunk-shops on the foot-paths endangers public safety any may result in serious accidents. Section 285 of the Karnataka Municipal Corporations Act, 1976 enjoins that none 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."

Again the Corporation, in the Additional statement of objections filed on 22-7-1985 in W.Ps. 9915 to 9977 of 1985 at paras 3 and 4, has stated thus:

"3. It is submitted that the petitioners have no right as such to carry on business in the bunk shops causing obstruction to the members of the public.

4. The bunk shops have blocked the foot-paths and the pedestrains of ten times have to step on to the roads which is highly congested with vehicular traffic. The bunk shops endangers human safety and results in accidents."

Again in the Additional Statement of objections filed by the Corporation on 20-9-1985 in Writ Petitions 11973 to 12053 of 1985, it is stated that there are no road margins in the roads in question, that the bunk shops are occupying portions of foot-paths obstructing the movement of pedestrains; that the pedestrian density on the foot-paths in question is so high that often times 10 to 15 persons walking abreast and many of them step on to the road-way for want of sufficient space on the footpaths despite the fact that the footpaths in question are considerably wide; that approximately the foot-paths in question are of the width as avered by the petitioners, but they are not of uniform width through out the length of the road.

8.4) It is very pertinent to notice that even the order dated 22nd July, 1982 of the State Government (Annexure-A) refers to the areas on which the bunk shops are put up as foot-paths. Thus, from the averments made by the parties and the description of the areas in question as foot-paths in the Government order (Annexure-A), it is established that the bunk-shops in question are located on the foot-paths and the same have blocked the foot-paths and are causing obstruction to the movement of pedestrains on the foot-paths in question. The existence of the bunk shops on the foot-paths in question, where the pedestrian density is very high, has not only created congestion but has also endangered public safety.

8.5) Sri Veerabhadrappe, learned Counsel for the petitioners, submits that

having regard to the width of the footpaths, the bunk shops which are occupying the outer edge of the footpaths occupy the road margin and not the foot-paths. In support of this, he has placed reliance on a decision of this Court, reported in 1972(2) Kar.L.J. 133 (C. Hanumanthappa v. Bellary City Municipality). That decision, instead of helping the petitioners, goes against them. It is stated therein that the road margin is part of a road itself. Therefore, it is not possible to hold that the aforesaid decision is of any assistance to the petitioners. In this regard, the provisions of the Act, may be referred to. Section 2-(31) of the Act, defines "public street" means any street, road, square, court, alley, passage or riding-path over which the public have a right of way whether a thoroughfare or not and includes the road-way over any public bridge or cause-way, the foot-way attached to any such street, public budge or cause-way etc. Sub-clause (c) thereof, is not relevant for our purpose. Therefore, from the definition "public street", it is clear that even foot-way is part of the public road and there is nothing like a road-margin. As far as the density of the vehicular traffic and movement of public on the foot-paths in the areas in question. Court can take judicial notice of the fact that it is hardly possible for any person to move safely without any area being occupied by bunk shops. With the existing bunk shops occupying considerable portion of the foot-path; in question, it has resulted in further congestion. Section 285 of the Act, provides 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 as provided in the Act. Thus an encroachment of any type including the putting up of bunk shops on foot-path is not permitted by the statute itself. Therefore, there is no power in the Corporation even to grant permission to put up bunk shops on foot-paths. In fact, it is the submission of the learned Counsel for the Corporation that what is done under the direction of the State Government is without the authority of law, and it is directly opposed to the provisions of Section 285 of the Act; that by taking action to remove the bunk shops, the Corporation is really carrying out the command of law and not exceeding its power. Even the Supreme Court, in *Olga Tellis & ors. v. Bombay Municipal Corporation & ors.* reported in 1985(3) S.C.C. 545, has held that the foot-paths are intended for public convenience and no construction whatsoever nor any shop be allowed to be put up on the same. Therefore, I am of the view that the bunk shops in question, put up on the places mentioned above, are on the foot-paths and not on any road margin (as contended by the petitioners). The contention of the petitioners that the foot-paths are wide enough to permit the bunk shops to be run on the outer edge of the foot-path without least causing inconvenience to the movement of the public on the footpaths is without force and cannot at all be accepted. Having regard to the submissions made by the Corporation that there is enormous increase in traffic and movement of public in Bangalore City and especially in the areas in question, it is not possible to hold that existence of the bunk shops on the foot-paths in question do not cause any inconvenience to the movement of the public. In the first place, they are not intended for private use and their use for private purpose

frustrates the very object for which they are carved out from portions of public streets or roads. The main reason for laying out pavements is to ensure that the pedestrians are able to go about with their daily affairs with a reasonable measure of safety and security. That facility which has matured into a right of the pedestrians, cannot be set at naught, by allowing encroachments to be made on the payements. Not only Sec. 285 of the Act, prohibits the use of foot-path for private purposes so as to cause obstructions to the users thereon. Section 58 (20) of the Act, makes it incumbent on the Corporation to remove obstructions, projections in or upon streets, bridges and other public places. Section 58(19) of the Act, further makes it incumbent upon the Corporation to construct, maintain and improve public streets. Therefore the State Government was not at all justified and was not within its power in issuing an order dated 22nd July. 1982 (Annexure-A) directing the Corporation to permit the petitioners to put up the bunk shops on the footpaths in question.

8.6) Accordingly, Point Nos. (5) and (6) are answered as follows:

Point No. (5) is answered in the affirmative.

Point No. (6): it was and is not at all open to the Corporation to permit the petitioners to put up the bunk shops on the footpaths in question. Accordingly, it is answered in the negative.

9. Point No. (1): The petitioners have no doubt asserted in the petition that there was a proceeding pending before the Corporation even before the order-Annexure-A was passed by the State Government to provide a place for them to put up bunk shops in the Corporation limits under Sec. 95 of the Act. The Corporation of the City of Bangalore has in its statement of objections denied the same and has pleaded that no such proceeding was pending before it. The petitioners, apart from asserting that there was such a proceeding pending before the Corporation, have not made available any records to the Court nor they have taken steps to call for relevant records, if any, therefore, it is not possible to hold in the presence of the plea raised by the Corporation that no such proceeding was pending; that there was a proceeding pending before the Corporation for providing sites to the petitioners to put up bunk shops in the Corporation limits. The order of the State Government, produced as Annexure-A which is already reproduced in extenso, also does not state that there was a proceeding pending before the Corporation which was called for by the Government and was considered. The order appears to have been passed suo motu by the State Government. No doubt, in the meeting in which the decision comprised in Annexure-A was taken by the Government, the commissioner of the corporation was present; but that by itself does not go to establish that there was a proceeding pending before the Corporation of the City of Bangalore to provide sites to the petitioners for putting up bunk shops. Therefore, it is not possible to hold that there was such proceeding pending before the Corporation. Point No. 1 is accordingly answered in the negative.

10.POINT NO. (2): Invoking of power under Sec. 95 of the Act, arises only in relation to the business pending before the Corporation, and that power can be exercised only on receipt of the records pertaining to that business. In the instant case, it has already been found that no proceeding relating to the subject-matter in question was pending before the Corporation. That being so, there was no question of exercising power by the State Government under Sec. 95 of the Act. Learned Government Pleader is also not able to lay his hand on any of the provisions of the Act, under which the order Annexure-A can be held to have been passed. The power of the State Government in relation to the Corporation, is governed by the Act and the Rules framed thereunder. That being so, in the absence of a provision which can be held to cover the order of the nature in question, it is not possible to hold that the impugned order fails within any one of the provisions of the Act. For the purpose of these petitions, it is sufficient to hold that the order- Annexure "A" passed by the State Government does not fall under Sec. 95 of the Act, as contended by the petitioners. Point No. (2) is accordingly answered in the negative.

11.1) POINT NO. (3): Pursuant to the aforesaid Government Order dated 22nd July, 1982 (Annexure-A), no doubt the Corporation has taken an undertaking from each one of the petitioners. The undertaking given by each one of the petitioners is contained in the agreement executed by each one of them. The agreement executed by each of the petitioners is in similar terms. Therefore, the one given by the petitioner in Writ petition No. 12002/85 is reproduced hereunder:

"This deed of agreement for issue of "temporary licence" is executed at Bangalore on this the day of 1st October 1982 between the Corporation of the City of Bangalore represented by its Deputy Commissioner (Rev) Shri K.P. Narayan, Corporation Offices, Bangalore, hereinafter called the licensor of the one part and Sri Fayaz S/o Shaik Pyare Sab, No. 35 Police Road, Nalubandwadi, Bangalore-53 hereinafter called the licensee of the other part.

Whereas the licensee applied to the licensor for the right to use Stall Nos. 1 Victoria Hospital by the side of underground to Fort, K.R. Road, Bangalore and the licensor made an order in pursuance of Govt. Order No. HUD 234 MNY 82 Dated 22-7-1982 to grant the same to the licensee for a period of eleven months on licence fee of Rs. 50/- (Rupees Fifty only) per month and

Whereas the licensee has deposited with the licensor a sum of Rs. 300/- (Rupees three hundred only) equivalent to six months licence fee vide a receipt No. 7147 dated 29-9-82. Now this deed of licence witnesseth as follows:

1. The right of use of space measuring 5 X 4" No. 1 of the licensor is hereby allowed to the licensee for a period of eleven months from this day on a licence fee of Rs. 50/- (Rupees Fifty only) per month.

2. The licence fee shall be exclusive of water, electricity and other charges which shall be paid by the licensee separately in time. The failure to pay shall entail the

liability of disconnection without any prior intimation.

3. The licensee shall pay the licence fee to the licensor regularly every month in advance within 7 days from the date of commencement of the month of licence.

4. The licensee shall use the space only for the purpose of plastic goods.

5. The licensee shall not use or utilise the space for storage manufacture of any material which may cause any fire, annoyance, nuisance etc.

6. The licensee shall keep the space and its surrounding area clean and in good condition and shall be liable to make good any damages which may be caused to the premises.

7. The licensee shall not encroach upon the passage and carryout any work in the premises such as projection, alteration addition etc., without obtaining the prior written permission from the licensor.

8. The licensee shall not part with possession of the premises or any portion thereof in any manner,

9. The licensee shall not change the nature of the business or enter into partnership with any one or relinquish his interest in the business or allow any other person to do business.

10. The licensee shall not keep the shop closed continuously for a period over 15 days without the previous permission from the licensor.

11. The licensee hereby agrees to vacate this licensed land by removing his temporary stall within fifteen days from the date of receipt of intimation from the licensor about being provided with alternative accommodation, if available.

12. On breach of any of the foregoing terms and conditions, the licence shall be liable to be terminated and the licensee shall be evicted in addition to subjecting the licensee to the consequences thereof including the liability for action being taken under the Karnataka Municipal Corporations Act, 1976.

13. On the expiry of the period of licence the sum of Rs. 300/- (Rupees three hundred only) deposited by the licence with the licensor shall be refunded by the latter to the former without interest after deducting therefrom any amounts that may be due to the licensor by way of damages or other dues.

14. The licensee shall not put up any kind of permanent structure on the land.

Sd.xx xx

Deputy Commissioner (Rev.)

Corporation of the City of Bangalore.

Licensor.

Sd. xx xx

Licensee."

11.2) Para No. 11 of the Agreement, which is signed by the Deputy Commissioner of the Corporation as well as the licensee, contains an undertaking of the licensee. He has agreed to vacate the land in respect of which licence is granted, by removing his temporary stall within fifteen days from the date of receipt of intimation from the licensor about being provided with alternative accommodation, if available. On the basis of the aforesaid undertaking, temporary licenses are issued to each one of the petitioners for a period of 11 months from 1st October, 1982. Licenses issued to each one of the petitioners are also in similar terms. The conditions of the licence are produced by the petitioners as Annexure-C which are as follows:

"CORPORATION OF THE CITY OF BANGALORE

Office of the Commissioner,

Corporation Office, Bangalore

Dated: 1-10-82.

TEMPORARY LICENCE

In pursuance of the proceedings of the Government No. HUD 234 MNY 82 dated 22-7-82 and in pursuance of his agreement with Bangalore City Corporation on dated 1-10-82 Sri Y. S. Wazeed S/o Syed Yousuff, is hereby issued a temporary licence to set up "temporary stall" in front of Sp. No. 13, Victoria Hospital Mysore Road, for a period of 11 months on a monthly licence fee of Rs. 50/- (Rupees fifty only) and on the following conditions:

1. The right of use of space measuring 5"X 4" No. 13 belong to the licensor is hereby allowed to the licensee for a period of eleven months from this day on a licence fee Rs. 50/- Rupees fifty only per month.
2. The licence fee shall be exclusive of water, electricity and other charges which shall be paid by the licensee separately in time. The failure to pay shall entail the liability of disconnection without any prior intimation.
3. The licensee shall pay the licence fee to the licensor regularly every month in advance within 7 days from the date of commencement of the month of licence.
4. The licensee shall use the space only for the purpose of Hosiery and Ready made cloth goods.
5. The licensee shall not use or utilise the space for the storage of manufacture of any material which may cause any fire, annoyance, nuisance, etc.
6. The licensee shall keep the space and its surrounding area clean and in good condition and shall be liable to make good any damages which may be caused to the premises.

7. The licensee shall not encroach upon the passage and carryout any work in the premises such as projection, alteration, addition, etc., without obtaining the prior written permission from the licensor.
8. The licensee shall not part with possession of the premises or any portion thereof in any manner.
9. The licensee shall not change the nature of the business or enter into partnership with any one or relinquish his interest in the business or allow any other person to do business.
10. The licensee shall not keep the shop closed continuously for a period over 15 days without the previous permission of the licensor.
11. The licensee shall vacate (as per the agreement executed by him) this licensed land by removing his temporary stall; within fifteen days from the take of receipt of intimation from the licensor about being provided with alternative accommodation, if available.
12. On breach of any of the foregoing terms and conditions, the licence shall be liable to be terminated and the licensee shall be evicted, in addition to subjecting the licensee to the consequences thereof including the liability for action being taken under the Kar. Municipal Corporation Act, 1976.
13. On the expiry of the period of license, the sum of Rs. 300/-(Rupees three hundred) deposited by the licensee with the licensor shall be refunded by the latter to the former without interest, after deducting there from any amounts that may be due to the licensor by way of damages or other dues.
14. The licensee shall not put up any kind of permanent structure on the licensed land."

Condition No. 11 of the licence, directs the licensee to vacate (as per the agreement executed by him) the licensed land, by removing his temporary stall within 15 days from the date of receipt of intimation from the licensor about being provided with the alternative accommodation if available. On the basis of these recitals contained in the agreement, the licence and the Government Order dated 22nd July, 1982 it is further contended that the petitioners have altered their position to their detriment and invested huge amount in the business by incurring loans from various financial agencies, and if only they were told that what was provided to them was only temporary accommodation for a period of 11 months and on the expiry of that period they were liable to vacate the sites allotted to them, they would not have ventured to put up the bunk shops and invest huge amount; therefore, it is the case of the petitioners that the representation in the aforesaid terms made by no less an authority than the Corporation coupled with the direction contained in the order issued by the State Government as per Annexure-A, they were given to believe that they were allowed to put up bunk shops and conduct their business in the places in question until they were allotted some place in the proposed new building in the

City Market.

11.3) This case of the petitioners is denied and resisted by the Corporation. It is the stand of the Corporation that as per the terms contained in the undertaking and Condition No. 11 of the licence, the petitioners are required to vacate on the expiry of the period mentioned in the licence and there is no assurance whatsoever given by the Corporation to the petitioners. It is also the case of the Corporation that the undertaking contained in the agreement and Condition No. 11 of the licence, hold good only for the period of the licence and they cannot be held to control the power of the Corporation beyond the period of licence.

11.4) From the contents of the licence and the agreement, it is clear that they do not contain any assurance by the Corporation. On the contrary, para No. 11 of the agreement imposes a liability on the petitioners to remove temporary stalls within fifteen days from the date of receipt of intimation from the licensor about being provided with alternative accommodation if available. Therefore, if the accommodation is available, then only there is a liability on the Corporation to provide the same to the petitioners. In the absence of availability of alternative accommodation, it is not possible to hold that para-11 of the agreement read with para-11 of the conditions of the licence amounts to an assurance by the Corporation to provide an alternative accommodation and until that is done, to permit the petitioners to continue to run their bunk shops on the foot-paths in question. No doubt, in the Government order (Annexure-A), there is a recital to the effect that before providing such wooden cabins to the existing stall holders each one of them should be asked to give an undertaking that he would vacate the place immediately after he is allotted some place in the proposed new building of the City Market. This recital contained in Annexure-A, according to learned Counsel for the petitioners, amounts to an assurance by the Corporation and the State Government together, as the Government Order is referred to in the licences given to the petitioners that the petitioners will be allotted some place in the proposed new building of the City Market and until then they will be allowed to continue their business in the bunk shops in question. It is very difficult to accept this contention. It is not possible to hold that the Government Order-Annexure "A" falls within Chapter IX of the Act, which deals with power of Government. Sri Veerabhadrappe, learned Counsel for the petitioners, has placed reliance on Section 96 of the Act, which falls under Chapter IX of the Act and contends that the Government Order is binding on the Corporation as it falls under Sec. 96 of the Act. Section 96 of the Act, reads thus:

"96. Government's power to direct the taking of action.-If, on receipt of any information or report obtained under Sec. 94 and 95 or otherwise Government is of opinion:

(a) that any duty imposed on any corporation authority by or under this Act has not been performed or has been performed in an imperfect, inefficient or unsuitable manner; or (b) that adequate financial provision has not been made for the performance of any such duty, Government may, after giving notice of not

less than fifteen days, by order, direct the corporation or the Commissioner within a period to be specified in the order, to make arrangements to their satisfaction for the proper performance of the duty, or to make financial provision to its satisfaction for the performance of the duty, as the case may be, and the Corporation or the Commissioner shall comply with such orders:

Provided that no notice shall be necessary in urgent cases."

From the aforesaid provisions, it is clear that a direction given by the Government must relate to any duty imposed on the Corporation by or under the Act, and that duty either had not been performed by the Corporation or had been performed in an imperfect, inefficient or unsuitable manner or no adequate financial provision is made for the performance of any such duty. It is only in such circumstances, the Government on giving notice of not less than 15 days may be order, direct the corporation or the Commissioner to make arrangements to their satisfaction for the proper performance of the duty, or to make financial provisions to its satisfaction for the performance of the duty, as the case may be within the specified period. It is not brought to my notice that it is one of the duties imposed upon the Corporation, by the Act to provide a piece to the petitioners or to similarly situated persons for putting up bunk shops. No provision either in the Act, or in the Rules is brought to my notice in this regard. That being so, it is not possible to hold that the Government Order dated 22-7-1982 (Annexure-A) falls within the scope of Sec. 96 of the Act. No other provision is relied upon to justify the Government Order. That being so, in the absence of a provision in the statute to support the Government Order, it is not possible to hold that merely because it is an order of the Government, a right in the petitioners is created to continue to run the bunk shops on foot paths and a corresponding duty or liability is imposed on the Corporation to provide sites for putting up shops or places in the new building of the City Market for running their business and until that is done, permit them to conduct their business in the existing bunk shops in question. The estoppel against a statutory body must have relation to the duty it is required to perform as per the law governing it. An act or conduct of a statutory body like the Corporation of the City of Bangalore, if at all in the instant case, it is construed as amounting to a positive representation or a promise to confer certain right or benefit on a person to whom such representation or promise is made, must be the one which is within its power. A representation or promise made by the statutory authority relating to the matter which does not lie within its power, cannot be held to be lawful one and as such, cannot be enforced. Consequently, the aid of the doctrine of equitable estoppel cannot be extended. Not only that it will not be in the public interest to extend the aid of equitable doctrine of estoppel to such cases, but it will also be suicidal to the very statutory authority itself. In the instant case, no such duty or liability is imposed upon the Corporation to provide sites for bunk shops. That being so, it is not possible to hold that there is a valid representation made by the Corporation to the petitioners that they will be allowed to continue their business in the bunk shops until they are provided with alternative sites or

places in the proposed new building of the City Market. Hence, it is not possible to hold that the Corporation is estopped from proceeding against the petitioners to evict them from the sites in question. It is also very pertinent to notice that the licenses issued to them have expired long back. No person without a licence can remain in occupation of the site belonging to the Corporation and carry on business on it that too without a licence. That being so, it is neither just and proper nor legal to prevent the Corporation from taking action against the petitioners. To do so, is nothing but preventing the Corporation from exercising the power vested in it under the Act. It is not open, and Law does not permit, to prevent a statutory authority from discharging its obligatory duty and exercising its statutory powers. Therefore, the Corporation cannot be estopped from proceeding against the petitioners and to evict them. In this connection, learned Counsel for the petitioners has placed reliance on para-39 of the judgment of the Supreme Court, in *M/s. Jit Ram Shiv Kumar v. State of Haryana*, reported in 1980 Supreme Court, 1285, which reads thus:

"39. The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows:

- (1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.
- (2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.
- (3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers.
- (4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.
- (5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State."

What I have already stated with regard to the plea of estoppel raised against the Corporation, is in conformity with the principles laid down in the aforesaid decision of the Supreme Court. No plea of estoppel is available so as to compel the authority to do the acts which are outside the scope of its authority and also

to prevent the authority from exercising its statutory powers. That being so, on applying the aforesaid principles, it is not possible to hold that the plea of estoppel is available to the petitioners against the Corporation even on construing that Annexure-A, agreements executed by the petitioners and Condition No. 11 of the Licences issued to them, amount to a promise made by the Corporation to secure alternative site or place in the new building of the City Market. To hold that the plea of estoppel is available to the petitioners in a matter like this, as already pointed out, is nothing but to prevent the Corporation from exercising its statutory powers. Such a thing is opposed to law, as such, it is not permissible.

11.5) In this connection, it is submitted that if the permission granted to the petitioners falls under sub-sec. (2) of Sec. 288 of the Act, it follows that it is permissible for the Corporation to grant such permission and in that event, it is not open to the Corporation to contend that it is not estopped from evicting the petitioners having regard to the promise made by them in the agreement and Condition No. 11 of the Licence. I have already held that there is no such promise made by the Corporation. In addition to this, it is also pertinent to notice that the licences were granted only for a period of 11 months and not beyond that. Further, the permission granted is of temporary nature and it cannot be continued indefinitely for several years.

11.6) Accordingly, Point No. (3) is answered in the negative and against the petitioners.

121) 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 Sec. 2(28) of the Act. It is an inclusive definition. It includes messuages 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 under Sec. 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, a Wakf under 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-houses, 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 Act, 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 that expression; therefore Sec. 288 of the Act, prevails over the Public Premises Act.

12 3) There is no doubt that Sec. 288 of the Act when compared to the Public Premises Act, becomes a special statute and it over-rides the provisions of the Public Premises Act. Section 288 of the Act, empowers the Commissioner to allow certain projections and erections. Sub-section (1) of Sec. 288 of the Act, is as follows:

"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 Sec. 288 of the Act, is exercised by the Commissioner. Sub-section (3) of Sec. 288 of the Act, prohibits granting of licence under the aforesaid sub-sec. (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, Sec. 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 Sec. 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, Sec. 288 of the Act, is a special statute. Whereas, Public Premises Act becomes a general statute in comparison to Sec. 288 of the Act. Therefore, the provisions of Sec. 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 the 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 L.I.C. of India & anr.*, reported in AIR 1981 S.C. 670. 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-rided 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 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-sec. (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 Sec. 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-sec. (1) thereof; therefore, it is not possible to hold that the provisions contained in the Public Premises Act, override the provisions contained in Section 288 of the Act. On the contrary, the provisions contained in Section 288 of the Act, being special provisions override the provisions contained in the Public Premises Act.

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

Foot-paths 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-sec. (5) of Sec. 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 sub-sec. (5) of Sec. 288 of the Act. Learned Counsel for the Corporation submits that the road-sides and street margins mentioned in sub-sec. (5) of Sec. 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 Sec. 285 of the Act, itself inasmuch as Sec. 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-sec. (5) of Sec. 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 Sec. 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 road; therefore, it is the case of the Corporation that sub-sec. (5) of Sec. 288 of the Act, is not attracted. Sri Veerabhadrappe, learned Counsel for the petitioners, places reliance on a decision of this Court in *C. Hanumanthappa v. Bellary City Municipality*, reported in 1972 (2) Kar. Law Journal, 133 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 the 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 & other v. R.K. Sadarangani & ors*, reported in AIR 1985 Madras, 23, 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 under 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 S. 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 Sec. 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-sec. (5) of Section 288 of the Act. Accordingly, the contention based upon sub-sec. (5) of Sec, 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-sec. (2) of Section 288 of the Act, cannot be exercised and in that event, the power under sub-sec. (4) of Sec. 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 footpaths. 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 shop temporarily for a particular period of 11 months can be held to fall under sub-section (2) of Sec. 288 of the Act. Hence, power under sub-sec. (4) of Sec. 288 can be exercised to remove the constructions put up pursuant to the permission granted under sub-sec. (2) of Sec. 288 of the Act.

15.POINT NO. (7): The petitioners have challenged the validity of sub-sec. (4) of Sec. 288 of the Act, on the ground that it is opposed to Articles 14, 21 and 19(1) (g) of the Constitution. In this connection, it is pertinent to notice that the Supreme Court had an occasion to consider the validity of Sec. 314 of the Bombay Municipal Corporation Act, 1888 (hereinafter referred to as the "B.M.C. Act"), in *Olga Tellis* case (1985(3) S.C.C. page 545]. The common factor between the provisions contained in Sec. 314 and sub-sec. (4) of Sec. 288 of the Act, is with regard to removal of construction without notice. It is the contention of the petitioners that the provision leads to arbitrary exercise of power inasmuch as it does not provide for holding an enquiry and affording an opportunity to the persons concerned whose constructions are going to be removed; therefore, it is hit by Article 14 of the Constitution. It is also the case of the petitioners herein that the said provision violates Articles 21 and 19(1)(g) of the Constitution, because on the removal of the bunk shops, the very

livelihood of the petitioners is taken away as the livelihood of the petitioners depends upon the business they carry on in the bunk shops in question. Further, the removal of bunk shops which are properties of the petitioners, amounts to depriving the petitioners of their properties without any reasonable cause and without any opportunity to show-cause; hence, it is opposed to Articles 14 and 19(1)(g) of the Constitution; and also contravenes Article 300-A of the Constitution. The provisions contained in Section 288 of the Act, are intended to meet the public need. They are intended to be exercised in the interest of the public and to safeguard the public interest; and also to ensure that no inconvenience is caused to the public in using the public roads and foot-paths. In the aforesaid *Olga Tellis* case, the Supreme Court, while considering the validity of Section 314 of the B.M.C. Act, has held that such a provision is valid. The reasons given in the judgment with regard to validity of Sec. 314 of the B.M.C. Act, equally apply to the validity of the provisions contained in sub-sec. (4) of Sec. 288 of the Act. Therefore, following the aforesaid decision of the Supreme Court, I hold that the provisions contained in sub-sec. (4) of Sec. 288 of the Act, are valid. Point No. 7 is answered in the negative.

16.1) Point No. (8): There is no doubt that after the expiry of the period for which the permission was granted to the petitioners, the occupation of the places in question by the petitioners became unauthorised. Even then, before evicting them from the places in their occupation, a show cause notice ought to have been given and an opportunity of hearing also ought to have been provided. In *Olga Tellis* case, the Supreme Court has specifically pointed out that it is necessary to issue notice and afford an opportunity of hearing. In that case also, there was an encroachment on the pavement and the municipal corporation tried to remove the encroachment. In the instant case, admittedly the Corporation has not yet taken steps to evict the petitioners from the foot-paths occupied by them. The contention of the petitioners is that before taking steps to evict them from the foot-paths occupied by them, they should be served with notice and an opportunity of hearing should be afforded to them. If only the objections raised by them in these petitions had not been heard in greater detail and the petitioners had not been allowed to putforth their say in the matter, which they would have otherwise putforth before the Commissioner against the action of evicting them from the foot-paths, probably the Corporation would have been restrained from evicting them without issuing notice and without affording an opportunity of hearing to them. The petitioners have approached this Court on the ground that they are likely to be dispossessed from the foot-paths occupied by them without any notice. The case which they would and could have put forth in answer to the notice issued under sub-sec. (4) of Sec. 288 of the Act, has been putforth by them before this Court. They were allowed to put-forth all the contentions which they could and those contentions have been considered. That being so, it is unnecessary to direct the Corporation to issue notice and to hold an enquiry once again. The Supreme Court, in *Olga Tellis* case, has observed thus:

"51. Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted by us in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. As observed in *S.L. Kapoor v Jagmohan* (1981)1 SCR 746, "where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs". Indeed, in that case, the Court did not set aside the order of supersession in view of the factual position stated by it. But, though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which, we believe, he would or should have passed, has he granted a hearing to them and heard what we did....."

Similarly, in the instant case, it has been established that the bunk shops in question are on the footpaths which are required to be maintained for the use of the public and not for conducting private business or for private use. They are to be kept free without any obstruction so that the movement on the foot-path by the users of it may be smooth and safe and secure. Therefore, having allowed the petitioners to put forth their contentions and considered them, it appears to me that it will not be just and proper and will not be in the interest of the public to direct the Corporation to issue notice to the petitioners to show cause as to why they should not be evicted from the foot-paths. Further, even if the commissioner would have heard them, the decision would not have been different from the present one. Point No. (8) is answered accordingly.

17. However, it is necessary to allow reasonable time to the petitioners to vacate the places in question as they are carrying on business in the bunk-shops in question and if they are directed to vacate immediately, their business will be paralysed and their livelihood will be affected. Therefore, it is necessary to grant time to vacate the foot-paths in question on which they have put up the bunk shops. Sri veerabhadrappe, learned Counsel for the petitioners submits that without prejudice to the right of the petitioners to go in appeal, an undertaking by them may be placed on record and they be granted time to vacate The memo dated 16-12-1985 containing an undertaking of the petitioners is filed. It reads thus:

"Subject to and without prejudice to right of appeal of petitioners and the orders that may be passed in Appeal, the petitioners undertake to vacate the bunk-shops voluntarily without driving the Corporation to take coercive steps, by the end of June 30th, 1986."

The aforesaid momo is placed on record and the undertaking of the petitioners is recorded. In view of the undertaking given by the petitioners, subject to payment of licence fee till the end of June 1986 along with arrears if any, the petitioners are granted time to remove the bunk shops, and vacate the places in question on or before the end of June, 1986.

18. It is also further submitted by Sri Veerabhadrappe, learned Counsel for the petitioners, that as the petitioners have been conducting business in the bunk shops from the year 1982 pursuant to Annexure-A, the Corporation may be directed to provide alternative accommodation. Learned Counsel for the Corporation submits that there are no shops available; therefore, it is not possible to accommodate the petitioners. However, learned Counsel for the Corporation submits that the petitioners may make necessary applications for allotment of shops anywhere in the Corporation area; and the Corporation will consider the same in accordance with law and subject to shops being available. The aforesaid submission made on behalf of the Corporation is placed on record.

19. For the reasons stated above, the writ petitions are dismissed. The petitioners are granted time till the end of June, 1986 on the basis of the aforesaid undertaking given by them, to remove the bunk shops and to vacate the foot-paths in question on or before the end of June, 1986.