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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**PUBLIC INTEREST LITIGATION NO.173 OF 2010
ALONGWITH
CIVIL APPLICATION NO.124 OF 2014**

Dr. Mahesh Vijay Bedekar.

.. Petitioner

-Versus-

The State of Maharashtra & Ora.

.. Respondents

.....
Mr. S. M. Gorwadkar, Senior Advocate, a/w Mr.S.H. Gangal and Mr.R. G.Shinde for the Petitioner.

Mr. V. S. Gokhale, AGP, for the Respondent Nos.1(a) to 1(d) .

Dr. Sadhana Mahashabde for the Respondent No.1(e).

Mr. R.S. Apte, Senior Advocate, i/b. Mr. N.R. Bubna for the Respondent No.2.

Mr. D. A. Dube for the Respondent No.3 (Union of India).

Ms. Trupti Puranik for the Respondent No.11.

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**CORAM: A. S. OKA AND
REVATI MOHITE DERE, JJ.**

DATE :- 24th JUNE 2015.

PC.:

A detailed ad-interim order was passed on 13th March, 2015 by this Court after recording detailed reasons. The ad-interim order passed in the main writ petition is in paragraph 9 of the said judgment and order dated 13th March, 2015 and the interim order passed in the Civil Application has been incorporated in paragraph 35 of the said order. The said order in terms of paragraph 9 governs the exercise of powers under

Section 234 of the Maharashtra Municipal Corporations Act, 1949 (for short “the said Act of 1949”) and Section 317 of the Mumbai Municipal Corporations Act, 1888 (for short “the said Act of 1888”)

2] As far as interim order in Civil Application is concerned, various directions were issued to the State Government. The said directions were issued essentially for implementation of the provisions of the Noise Pollution Rules and the various directions issued by the Apex Court from time to time which are binding on all concerned including the State Government. It is not necessary for us to reproduce elaborate interim directions contained in paragraph 35 of the said order. Clause (ii) of paragraph 35 provides for creating appropriate grievance redress mechanism for receiving complaints in accordance with the Noise Pollution Rules. Clause (iv) directs the State Government to notify the names and addresses and all particulars of the authorities under the Noise Pollution Rules and the Rules framed under the said Act of 1951. Adequate publicity was ordered to be given in the manner provided in clause (iv). Clause (v) directs the State Government to set up a grievance redress mechanism within the limits of each Municipal Corporation in terms of clause (ii) of paragraph 35 within a period of two months from 13th March, 2015. One of the directions was to ensure that modern

equipment is provided to all concerned authorities to enable them to ascertain the noise level.

3] Today, an affidavit has been filed by Shri Sunil Jaikumar Sovitkar, Deputy Secretary, Home Department, Mantralaya. Going by what is stated in the said affidavit, only inference which can be drawn is that the State Government has completely failed to abide by any of the directions in the said order and in particular directions in paragraph 35 of the order. All that the Home Ministry has done is to write a letter dated 18th June, 2015 to the Principal Secretary of the Revenue Department, the Principal Secretary of the Urban Development Department and the Principal Secretary of Environmental Department inviting attention of the respective Secretaries to the directions issued by this Court. Thus, the Home Ministry communicated the order dated 13th March, 2015 after lapse of two months to the concerned departments. The directions issued by this Court were for implementation of the Rules framed to prevent the Noise Pollution. The directions were to ensure that the orders of the Apex Court are implemented. We are constrained to observe that the State Government has taken the said directions very casually. As stated earlier, the State Government has taken up more than two months only for bringing the said directions to the notice of the Secretaries of the

concerned departments. There is a non-compliance with practically every direction. Therefore, proceedings under the Contempt of Court Act, 1971 will have to be initiated against the Government officers who are responsible for committing the breach of this direction issued by this Court. We direct the office of the Government Pleader to supply a copy of the order dated 13th March, 2015 and a copy of affidavit of Shri Sunil Jaikumar Sovitkar to the Chief Secretary of the State Government. The Chief Secretary of the State Government shall ascertain the names of the officers who are responsible for committing the flagrant violation of the directions issued by this Court. Within a period of two weeks from today, an affidavit shall be filed by him setting out the names and designations of the officers who are responsible for the breaches of the order of this Court. After such affidavit is filed, necessary proceedings will be initiated under the Contempt of Courts Act, 1971 against the erring Government Officials.

4] Now, we turn to the ad-interim relief granted in the PIL. The Paragraphs 9 and 10 of the order dated 13th March, 2015 read thus:-

“9. Therefore, by way of ad-interim relief, we direct that the discretionary power under the section 234 to grant permission to erect temporary booths or similar structures on streets on account of festivals shall be exercised by the Commissioners subject to aforesaid constraints set out in paragraph 8 above. We also direct the Municipal Corporations to frame a policy for dealing with grant of such permissions in the light of what we

have held above. The policy shall be framed in two months from today. We also direct the Municipal Corporations to take immediate action of demolition in respect of the temporary booths/platforms or similar structures erected on public streets without obtaining the requisite permission under section 234. Such action shall be taken before the religious festivals/functions are over. We also direct that whenever such permissions are granted, a condition shall be incorporated therein of prominently displaying the particulars of such permissions on the temporary booths or similar structures covered by section 234 of the said Act of 1949.

10. Several photographs have been annexed to the petition showing that for celebration of Navratri Festivals, important roads in the City of Thane were completely blocked. This affects the fundamental rights of the citizens. This also affect traffic of emergency vehicles and ambulances plying on public streets apart from the fact that such activities involve public nuisance covered by section 133 of the Criminal Procedure Code, 1973 (for short "Cr.P.C."). There is no reply filed by the State Government on this aspect. We direct the State Government and all the Municipal Corporations to file a reply even on this aspect. Appropriate directions will have to be issued on this aspect after reply is filed."

5] Thus, it was directed that the discretionary power under section 234 of the said Act of 1949 of grant of permission to erect temporary booths or similar structures shall be exercised by the Commissioners subject to the constraints set out in paragraph 8 of the said order. The paragraph 8 of the said order reads thus:-

"8. The Section 234 does not confer absolute power. The power conferred on the Commissioner is discretionary. The power cannot be exercised without the concurrence of the Commissioner of Police or the Superintendent of Police, as the

case may be. The exercise of power without their concurrence will be bad in law. It is obvious that a permission under the provision cannot be granted if the temporary erection of booths or similar structures is likely to affect free movement of vehicular traffic. Permission to erect booths on the footpaths or foot-way cannot be granted if the same is likely to obstruct free movement of the pedestrians. It is obvious that the discretion cannot be exercised by granting permissions to erect booths or like structures on a very busy public streets having a large vehicular traffic. It cannot be exercised in relation to footpaths in localities having a large population and in respect of footpaths in the localities which are very crowded. The power cannot be used in relation to public streets including footpaths or foot-ways near Railway stations/public bus stands/major auto rickshaw or taxi stands. It follows that such permissions cannot be granted if the grant of such permissions is likely to result into a major traffic congestion or is likely to cause obstruction to large number of pedestrians in the use of foot-way. Such permissions cannot be granted on streets or foot ways in the vicinity of major hospitals and educational institutions. These cases are set out only by way of illustrations. This is not the exhaustive list of footpaths and streets in relation to which the discretionary power should not be exercised. While exercising the discretion under the said section, the Commissioner of the Municipal Corporations shall consider all such relevant factors.”

6] What is held by this Court is that the power vesting in the Municipal Commissioner both under the said Act of 1949 and the said Act of 1888 to grant permission for temporary erection of booths or similar structures cannot be exercised if the construction of booths/structures on the streets or on footpaths/foot-ways is likely to obstruct free movement of traffic or free movement of pedestrians.

7] This Court by Judgment and order dated 20th May, 2015 in

Suo Motu PIL No.71 of 2013 held thus:

“9. As pointed out earlier, by the judgment and order dated 31st August, 2006 this Court has already held that the right to have roads in reasonable condition is a part of the fundamental right guaranteed under Article 21 of the Constitution of India. Thus, the Division Bench has placed the right of citizens to have pothole freeroads in reasonable condition on the highest pedestal of fundamental rights under Article 21 of the Constitution of India. Existence of such fundamental right creates corresponding obligation in all the authorities which are “State” within the meaning of Article 12 of the Constitution of India. For the infringement of the fundamental right guaranteed under Article 21 of the Constitution of India, a citizen can demand compensation apart from seeking the enforcement of the right. Moreover, a citizen has a right to make grievances regarding the violation of such right and get the grievances redressed.”

(underline supplied)

Thus, this Court has held that a right to have streets in a reasonable condition is a fundamental right of the citizens. This Court has held that the definition of streets under the Municipal Laws includes footpaths or foot ways. Thus, this Court has held that the right to have roads and footpaths or foot ways in a reasonable condition is a fundamental right. It is a part of Article 21 of the Constitution of India. It is obvious that while

exercising power under Section 234 of the said Act of 1949 and Section 317 of the said Act of 1888, the Municipal Commissioners shall be bound ensure that this fundamental right available to the citizens is not violated. The Commissioners are bound to consider the fact that the roads exist for vehicular traffic and the footpaths are meant for the use of pedestrians.

8] There is another aspect of the matter. This Court has already noted in order dated 13th March, 2015 that temporary booths or similar structures are erected on roads and footpaths mainly for celebration of Ganpati, Navratri and other religious festivals. This Court is conscious of the fundamental rights conferred by Article 25 of the Constitution of India on every citizen. However, the scope of the rights conferred by Article 25 has been explained by the Constitution Bench of the Apex Court in the case of *Dr. M. Ismail Faruqui etc. V/s. Union of India* ¹ It will be necessary to make a reference to what is held in paragraph 80 and 81 of the said decision which read thus:-

“80. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution of does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom

1 AIR 1995 SC 605

guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

81. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially."

(underlines supplied)

9] What is held by Apex Court can be summarized as under:-

(a) The right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution does not extend to worship at every and any place of worship. The protection under Article 25 of the Constitution is to religious practice which forms an essential and integral part of a religion; and

(b) The offer of prayer or worship may be a religious practice but its offering at every location where such worship can be made is not an essential and integral

part of religion unless the particular place has a particular significance for that religion so as to form an essential and integral part of that religion.

10] Therefore, the Municipal Commissioners while exercising the power under Section 317 of the said Act of 1888 and Section 234 of the said Act of 1949, in addition to the constraints which are incorporated in paragraph 8 of the order dated 13th March, 2015 will have to ensure that the right of citizens to have roads and footpaths or foot-ways in a reasonable condition is not violated. We may reiterate here that the denial of permission to erect temporary booths or any other structure for a temporary period on public streets or footpaths or foot-ways for holding any religious function or religious festival of all religions will not amount to the infringement of the fundamental rights guaranteed under Article 25 of the Constitution of India unless it is shown that the street or footpath in question has a particular significance for that religion so as to form an essential and integral part thereof.

11] Unfortunately, none of the Municipal Corporations have chosen to comply with directions issued under the order dated 13th March, 2015 by framing a policy. At this stage, the learned Senior Counsel

representing the Municipal Corporation of the City of Thane has placed on record a copy of the order dated 17th August, 2011 passed by the Commissioner of the said Municipal Corporation laying down the policy for exercise of powers under Section 234. Clause (2) of the policy shows that the Municipal Commissioner is under an impression that if the booths or structures do not cover more than 1/3rd width of the road, it will not cause any obstruction to the traffic. The said approach is erroneous. The policy incorporated in the said order is not consistent with the ad-interim order dated 13th March 2015.

12] At this stage, the learned Senior Counsel appearing for the petitioner has tendered a copy of a report dated 24th June, 2015 prepared by Awaaz Foundation, an environmental NGO specializing in anti noise pollution. It is pointed out that the said NGO has measured noise levels during religious festivals every year since 2003. It is pointed out that the second highest decibel levels were from trucks carrying generators and wall of loudspeakers playing music during Ganpati, Id e Milad and Mahim Fair. It is stated that noise pollution from brass instruments including cymbals (tasha) without amplification reaches a level of 121.4 dB and emit a very shrill disturbing sound. The noise pollution from large plastic membrane drums and banjos amplified with loudspeakers reaches level of

125 db. It is stated that single and serial firecrackers used in processions measure up to 125db. Along with the said report, a report on noise pollution levels during Id e Milad on 4th January, 2015 as well as a report on noise pollution levels in Mumbai on 10th day of Ganpati festival of 2014 have been enclosed. Details of the noise pollution levels on other religious festivals such as Mahim Fair etc. are also produced. These reports show alarming situation. Copies of the said reports have been supplied by the learned Senior Counsel appearing for the petitioner to all the concerned respondents including learned AGP. In the context of what is stated in the said report, the complete failure of the State Government to comply with the directions of this Court becomes very serious.

13] We direct the learned AGP to provide copies of the reports to the Chief Secretary of the State Government along with the copies of the order and affidavit as directed above. The reports will have to be dealt with at the time of next hearing.

14] One issue is regarding the grant of permissions in exercise of the statutory powers. The other issue is regarding the temporary booths/structures erected for religious festivals without obtaining the permission of the Commissioner. All concerned will have to ensure that no

such temporary booths/structures are erected without obtaining a valid permission of the Municipal Commissioner. Hence, we propose to direct the District Collectors to constitute a team of Revenue officers not below the rank of Tahsildars to visit all the concerned Municipal Corporation areas during the period of 7 days prior to all major religious festivals and during the period of major religious festivals with a view to ascertain whether any such temporary booths/structures have been erected without permission of the Municipal Commissioner. The members of the team so appointed by the Collectors shall report directly to the concerned Municipal Commissioner about any such illegal erection of temporary booths/structures to enable the Municipal Commissioner to take action of removal immediately. It is obvious that while granting permission for erection of temporary booths/structures, a condition will have to be incorporated of prominently displaying a copy of the permission as well as the particulars of the permission on the temporary booths erected on the basis of the permissions.

15] Hence, for the reasons recorded in this order and the reasons recorded in the order dated 13th March 2015, we pass the following order:-

- (i) The ad-interim relief granted in terms of paragraph 9 of the order dated 13th March, 2015 shall continue to operate with further modifications and clarifications made by this order;
- (ii) We direct that the discretionary powers under the section 234 of the said Act of 1949 and Section 317 of the said Act of 1888 to grant permission to erect temporary booths or similar structures on public streets(including footpaths/foot-ways) for holding of festivals/ceremonies shall be exercised by the Commissioners subject to aforesaid constraints set out in paragraph 8 of the order dated 13th March 2015 which we have reproduced in paragraph 5 above. We also direct the Municipal Commissioners to frame a policy for dealing with grant of such permissions in the light of what we have held in this order and the order dated 13th March 2015. The policy shall be framed within a period six weeks from today which shall be placed on record along with an affidavit. We also direct the Municipal Corporations to take immediate action of demolition in respect of the

temporary booths/ structures erected on public streets without obtaining the requisite permissions. Such action shall be taken before the religious festivals/functions are concluded. We also direct that whenever such permissions are granted, a condition shall be incorporated therein of prominently displaying a copy of permission and the material particulars of such permission on the temporary booths or structures covered by section 234 of the said Act of 1949 and Section 317 of the said Act of 1888.

(iii) While exercising the power under section 234 of the said Act of 1949 and Section 317 of the said Act of 1888, the Commissioners of the Municipal Corporations shall be bound to ensure that the fundamental right of citizens to have roads and footpaths and/or foot-ways in a reasonable condition which is guaranteed by Article 21 of the Constitution is not violated;

(iv) While exercising power, the commissioners shall have due regard to the law laid down by the Apex Court in

paragraph 80 and 81 in the case of Dr. M. Ismail Faruqui etc. V/s. Union of India which holds that the fundamental right guaranteed under Article 25 does not extend to worship at any and every place unless the place has a particular significance for that religion so as to form essential and integral part of religion;

- (v) We direct the District Collectors of all the Districts in the State to constitute a team of Revenue Officers not below the rank of Tahshildars for each Corporation area. The members of the team shall visit the areas within the limits of the Municipal Corporation periodically for a period of 7 days before the date of commencement of the major religious festivals and during the festivals to ascertain whether any temporary booths/structures have been erected on public streets and footpaths / foot-ways without obtaining permission of the Municipal Commissioners. Any such structure which does not display the permission and material details thereof shall be deemed to be illegal. The members of the team shall under an obligation to bring to the notice of the

Municipal Commissioners, the temporary booths erected on streets and footpaths or foot-ways without obtaining permission of the Commissioners. The Municipal Commissioners shall forthwith take action of removal on the basis of such information;

(vi) If any such illegal activities involve public nuisance covered by section 133 of the Code of Criminal Procedure, 1973, necessary action shall be taken in accordance with law by all the concerned authorities;

(vii) We make it clear that this order as well as the earlier order shall apply to festivals/ceremonies of all the religions;

(viii) We direct the State Government to issue directions to all the District Collectors and Municipal Corporations in the light of the law laid down by this Court in this order. Compliance shall be made within a period of one month from today;

(ix) In the event, the Municipal Commissioners or the Municipal Staff or the members of the team constituted by the Collectors need police help and protection for the implementation of this order or the implementation of the provisions of law, on an application being made by them, all concerned local police station shall forthwith provide adequate police protection to them;

(x) The Civil Application No.124/2014 shall be placed on board on 3rd July, 2015. On that day, appropriate order shall be passed in the light of affidavit which will be filed by the Chief Secretary of the State. Interim orders passed thereon shall continue till further orders;

(xi) Though none of the Municipal Corporations have filed affidavits in terms of the earlier order, by way of indulgence, we grant time to Municipal Corporations to file affidavits till 2nd July, 2015.

(REVATI MOHITE DERE, J.)

(A. S. OKA, J.)