IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS 28TH THE DAY OF JULY, 2021

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BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.14459/2019 (LB- BMP)

BETWEEN

SMT. CHITRAKALA

... PETITIONER

(BY SRI SUNIL S RAO, ADVOCATE (VIDEO CONFERENCING))

AND

1. THE STATE OF KARNATAKA
REPRESENTED BY ITS SECRETARY,
DEPARTMENT OF URBAN DEVELOPMENT,
VIDHANA SOUDHA,
BENGALURU – 560 001.

2. THE COMMISSIONER
BRUHAT BENGALURU MAHANAGARA PALIKE,
BENGALURU – 560 001.

3. THE HEALTH OFFICER
BRUHAT BENGALURU MAHANAGARA PALIKE,

RAJAJINAGAR
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI NITHYANANDA K.R., HCGP FOR R1 (PHYSICAL HEARING)
SRI AMIT DESHPANDE, ADVOCATE FOR R2 & R3
(PHYSICAL HEARING))

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER DATED 16.3.2019 AT ANNXURE-A.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This writ petition raises a rudimentary principle of law, ***'he who decides, must hear***, by calling in question an order dated 16.03.2019, bearing No.PSR(4)/11664/2018- 19, passed by the Commissioner of the Bruhat Bengaluru Mahanagara Palike (hereinafter referred to as 'the BBMP' for short), declining to accept the claim of the petitioner and directing that the activity of the petitioner performed in her residential premises cannot be allowed to be continued.

2. Heard Sri Sunil S. Rao, learned counsel appearing for the petitioner, Sri Nithyananda K.R., learned High Court Government Pleader appearing for the first respondent and

Sri Amit Deshpande, learned counsel appearing for the second and third respondents.

3. The petitioner on an identical notice being issued to her on 30.08.2018, had filed writ petition No.40663/2018, challenging the said notice on the grounds that were urged therein. This Court by an order dated 11.02.2019, disposed of the writ petition with a direction to the BBMP to determine whether the activity conducted by the petitioner in her premises was permissible in terms of the notification dated 20.03.2015. The order of this Court reads as follows:

> *"6. The respondent-BBMP is directed to determine as to whether the activity being conducted in the premises belonging to the petitioner by the tenants are permissible in terms of the notification dated 20.03.2015. The notice at Annexure-A is liable to be set aside as there is no determination as such which is to have preceded the exercise of power of sealing the premises. However, taking note of the fact that the premises has been sealed, the BBMP is directed to complete the determination as mentioned above and the petitioner is restrained from carrying*

on any activity till the determination is completed by the BBMP.

7. However, if the determination is not completed within a period as stipulated above, the petitioner is at liberty to re-enter the premises and carry on activity as was being conducted as on the date the mahazar was prepared, i.e., on 11.12.2018.

8. In the process of adjudication as regards permissibility of activity as provided above, the BBMP is at liberty to take note of the documents submitted by any person including the complainant, who may be aggrieved by the continuation of such activity by the petitioner and also take note of other documents which the authority may obtain in accordance with the procedure which may have a bearing on the matter. The said process of adjudication cannot be treated as an adversarial proceeding involving the right of audience as regards other persons including the complainant.

9. It is also made clear that the right of the respondent-BBMP to take note of the other proceedings initiated which may have a bearing on

the matter is kept open. The BBMP is at liberty to initiate any action if other illegalities are committed by the petitioner, in accordance with the procedure prescribed under law."

After the matter being remitted to the BBMP for determination in the manner which this Court had directed, proceedings were initiated by the Head of the Legal Cell, who heard the petitioner and the third respondent - Health Officer, who had inspected the premises of the petitioner and issued the notice on earlier occasion. After the matter was heard by the Head of the Legal Cell, the Commissioner passed an order on 16.03.2019, declining to permit the activity that the petitioner was conducting in her residential premises. It is this order that is called in this writ petition before this Court.

4. Sri Sunil S. Rao, learned counsel appearing for the petitioner would submit that the Head of the Legal Cell could not have heard the matter and the Commissioner passing an order

declining to permit the activity that the petitioner was carrying in her residential premises on such hearing, is unknown to law.

5. On the other hand, Sri Amith Deshpande, learned counsel appearing for the second and third respondents - BBMP would vehemently refute the submission and contend that in terms of Section 66 of the Karnataka Municipal Act, 1976, the power of the Commissioner to hear and dispose of the matters are delegated to the Head of the Legal Cell, subject to the final decision of the Commissioner and the order passed by the Commissioner cannot be found fault with, is his emphatic submission.

6. I have given my anxious consideration to the submissions made by the learned counsel appearing for the respective parties and have perused the material on record.

7. The facts that are not in dispute, need not be reiterated. This Court directed the BBMP to hear the matter and dispose the same in accordance with law, finding fault with the action

that was taken earlier. After the proceedings were remitted to the hands of the BBMP, the Head of the Legal Cell initiated and conducted proceedings of hearing both the petitioner and the third respondent - Health Officer of the BBMP, who was the representative of the BBMP. On considering certain facts, determination was also made by the Head of the Legal Cell, which reads as follows:

> *"The following determination order is made:*
>
> *"In view of the above, it is determined that, the activities in the building in question viz.,*
>
> *cannot be allowed to be continued, in view of Government Notification No.UDD 105 MNJ 2008, Bangalore, dated: 20- 03- 2015, issued under the Zoning Regulations in the RMP- 2015".*

After such determination, as a result of the enquiry that he conducted, the Commissioner on 16.03.2019 has passed the impugned order not permitting the petitioner to carry on her

activity that she was performing in her residential premises. The issue is not with regard to the activity carried on by the petitioner that has to be examined at this juncture by this Court but, could the Commissioner have passed the order, without hearing the parties.

8. Proceedings pursuant to the direction of this Court is admittedly initiated and heard by the Head of Legal Cell and the Commissioner who did not hear the grievance or the matter, as directed by this Court, has passed the impugned order. Therefore, here is a case where the Commissioner who did not hear the matter has decided it. It would fall foul of the rudimentary principle of ***'he who decides must hear'.*** The issue with regard to the said principle of ***'he who decides must hear'*** has cropped up close to scores years ago by the Apex Court in the case of ***GULLAPALLI NAGESWARA RAO v. A.P.STATE ROAD TRANSPORT CORPORATION***[1]**,** wherein the Apex Court has held as follows:-

[1] **AIR 1959 SC 308**

"30. With this background we shall proceed to consider the validity of the three alleged deviations of the State Government from the fundamental judicial procedure. In the present case, the officer who received the objections of the parties and heard them personally or through their representatives, was the Secretary of the Transport Department. Under the 'Madras Government Business Rules and Secretariat Instructions' made by the Governor under Article 166 of the Constitution, the Secretary of a department is its head. One of the parties to the dispute before the State Government was the Transport Department functioning as a statutory authority under the Act. The head of that department received the objections, heard the parties, recorded the entire proceedings and presumably discussed the matter with the Chief Minister before the latter approved the scheme. Though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself. It is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter. In Ranger v. Great Western By. Co. [(1854) 5 HLC 72, 89: 10 ER 824, 827] Lord Cranworth L.C., says:

> *"A Judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary*

cases it is just ground of exception to a Judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent."

In Rex v. Sussex Justices Ex parte McCarthy [(1924) 1 KB 256, 258] Lord Hewart C.J., observed:

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspects as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done."

This was followed in Rex v. Essex Justices Ex parte Perkins [(1927) 2 KB 475]. In Franklin's Case (supra) [(1948) AC 87] , though on a construction of the provisions of that Act under consideration in that case it was held that the Minister was not acting judicially in discharging his duties, his Lordship accepted the aforesaid principle and expressed his view on the doctrine of 'bias' thus, at p. 103:

> *"My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute."*

The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter or fundamental importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the

> *case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The hearing given by the Secretary, Transport Department, certainly offends the said principle of natural justice and the proceeding and the hearing given, in violation of that principle, are bad."*

It is also apposite to refer to a judgment of the Division Bench of the Kerala High Court in the case of ***UNION OF INDIA v. P.ANDREW***[2]***,*** wherein the Division Bench of Kerala High Court following the judgment in ***Gullapalli Nageswara Rao*** *(supra),* holds as follows"-

> ***"****5. The next question which requires to be decided is whether the rule that the person or authority who heard the case should pass orders is an indispensable requirement in the observance of principles of natural justice. This rule has a salient purpose. The authority who passes the order, must apply its mind after hearing the aggrieved party. During the course of the hearing, the authority must be able to formulate the conclusions after noticing even the demeanour of the parties. De Smith's Judicial Review of Administrative Action frames this rule as this:*
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> > *"Must he who decides also hear? In general the answer is in the affirmative. It is a breach of natural justice for a member of a judicial Tribunal or an arbitrator to*

[2] **1996 SCC Online Ker 6**

> *participate in a decision if he has not heard all the oral evidence and the submissions. The same principle has been applied to members of administrative bodies who have taken part in decision affecting individual rights made after oral hearings before those bodies at which they have not been present for bias and ignorance alike preclude fair judgment upon the merits of the case."*

This rule has its base on R.V. Manchester, JJ.ex P. Burke [(1961) 125 J.P. 387] where a decision was quashed because a member of the Bench who had not heard the evidence appeared to participate in the decision, the Supreme Court recognised this rule in Gullapalli Nageswara Rao v. Andhra Pradesh Slate. Road Transport Corporation [A.I.R. 1959 S.C. 308], wherein it has been held thus:

> *"The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure by the rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We, therefore, hold that the said*

procedure followed in this case also offends another basic principle of judicial procedure."

(emphasis supplied in the original)

8. The Constitution Bench in Gullapalli Nageswara Rao case [A.I.R. 1959 S.C. 308] (vide supra) discussed Arlidge case [1915 A.C. 120] (vide supra) and three other decisions, namely, Ranger v. Great Western Rly. Co. [1954-5 HLC 72] Rex v. Sussex Justices; Ex parte McCartthy [1924 (1) K.J.B. 256] and Rex v. Essex Justices: Ex parte Perkins [1927 (2) KB 475] and held:

"The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute."

(emphasis supplied in the original)

The theory that "the one who decides must hear" is recognised for the reason that bias and ignorance alike preclude fair judgment upon the merits of the case.

9 The rule "the one who decides must hear" declared by the Constitution Bench in Gullapalli Nageswara Rao case (vide supra), derives support from a famous case decided by the Supreme Court of United States in Morgan v. United States [(1936) 298 U.S. 468]. In that decision that Court invalidated a price-fixing order of Secretary of Agriculture merely on the ground that the Secretary himself had not personally heard or read any of the evidence or

considered the arguments submitted but had decided the matter solely on the advice of his officials in consultations at which the objectors were not present. Chief Justice Hughes rejected the very essence of administrative practice by refusing to allow that 'one official may examine evidence, and another official who has not considered the evidence may make the findings and order'.

Chief Justice further said:

> *"That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is akin to that of a Judge. The one who decides must hear."*

J.F. Garner in Administrative Law says:

> *"In the outcome that final decision process rests in the same hands as it does in England, and in most corresponding cases the result may prove similar in both countries, but at least in the U.S.A. there is a greater appearance of justice."*

In the light of the judgment of the Apex Court and the judgment of the Division Bench of the High Court of Kerala, the justification of the learned counsel appearing for the BBMP would not hold water as indisputably, the Commissioner has never heard the parties.

9. The learned counsel appearing for the BBMP would place reliance upon an office order dated 04-01-2019, issued by the Commissioner, delegating all the authority that has been conferred upon him under the Karnataka Municipal Corporations Act, 1976 (hereinafter referred to as 'the Act' for short) and even toughing the provisions of other legislations to be heard by Head of the Legal Cell. The office order reads as follows:

> *"In exercise of the powers vested in me under Section 66 of the Karnataka Municipal Corporations Act, 1976, I, N.Manjunatha Prasad, I.A.S. Commissioner, Bruhat Bengaluru Mahanagara Palike, Bengaluru do hereby confer/delegate all my ordinary powers, duties and functions of hearing, touching the provisions not only of Karnataka Municipal Corporation Act, 1976 but also touching the provisions of other legislations, which have bearing on the subject matter in question, relating to various legal matters of BBMP, in which Hon'ble courts have directed to hear and to pass considered orders connected thereto,* ***subject, of course, to my final decision, in each and every such matters,*** *on Sri K.D.Deshpande, Head of the Legal Cell, who being the Head of Legal Department, bruhat Bengaluru Mahanagara Palike, Bangalore.*

> *This office order shall come into force with immediate effect."*

The defence and justification is unacceptable. Manifold powers, duties and obligations are cast upon the Commissioner in terms of the Act, a few of them are quasi judicial in nature as the Commissioner is empowered to adjudicate upon the rights of the parties. Adjudication upon the rights of the parties cannot but be a power which is quasi judicial in nature. Therefore, quasi judicial power will have to be exercised only by such officer who is empowered to exercise and not by any other authority. Delegation of powers in terms of office order *(supra)* is by taking recourse to Section 66 of the Act, which reads as follows:-

> *"66. **Delegation of Commissioner's ordinary power**.- Subject to the rules made by the State Government, the Commissioner may delegate to any officer of the Corporation subordinate to him any of his ordinary powers, duties and functions including the powers specified in Schedule III."*

Section 66 of the Act, in my considered view, can only be a delegation of his ordinary powers, duties and functions and not delegating quasi judicial powers. Quasi judicial powers cannot

be bartered away contrary to duties and obligations imposed upon the Commissioner in terms of the statute.

10. For the aforesaid reasons, the following:

ORDER

i. The writ petition is allowed in part.

ii. The order dated 16.03.2019, bearing No.PSR(4)/11664/2018- 19, passed by the Commissioner, is set aside.

iii. The matter is remitted back to the hands of the Commissioner to hear the parties as directed by this Court in writ petition No.40663/2018 dated 11.02.2019 and pass appropriate orders in accordance with law.

iv. Setting aside of the order of the Commissioner impugned, would not however mean that the petitioner can restore the activity in the premises she was performing earlier.

v. The consequential benefit of either the activity to be let or not, would depend upon the orders of the Commissioner in the proceedings now remitted.

vi. The aforesaid exercise shall be completed by the respondents - Commissioner within eight weeks from the date of receipt of the copy of the order.

vii. Since both the parties are represented, I deem it appropriate to direct the petitioner to appear before the Commissioner on 16.08.2021 at 3 p.m., without awaiting any notice from the hands of the Commissioner, and the Commissioner shall hear the petitioner and decide the issue within six weeks, thereafter.

Sd/-
JUDGE