

(2012) 02 BOM CK 0030

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 2416 of 1994

Satish Kasar

APPELLANT

Vs

The State of Maharashtra and
Smt. Kusumbai Eknathrao Kale

RESPONDENT

Date of Decision: Feb. 13, 2012

Acts Referred:

- Bombay Prohibition Act, 1949 - Section 142, 142(1), 142(2), 54, 56
- Constitution of India, 1950 - Article 226, 227, 8
- Merchandise Marks Act, 1889 - Section 482, 483, 484, 485, 486
- Sea Customs Act, 1878 - Section 167

Citation: (2012) 5 ALLMR 248

Hon'ble Judges: Sunil P. Deshmukh, J; B.R. Gavai, J

Bench: Division Bench

Advocate: Monish Nilwant, holding for Mr. S.B. Talekar, for the Appellant; K.G. Patil, A.G.P. for Resp. No. 1 and 2, for the Respondent

Final Decision: Allowed

Judgement

Sunil P. Deshmukh, J.

The petitioner has approached this court invoking its powers under Articles 226 and 227 of the Constitution of India, against the order dated 22.7.1994, directing him to shift his country liquor shop to other place, failing which, the same would be closed pursuant to powers u/s 142(1) of the Bombay Prohibition Act, 1949 ("The Prohibition Act" for short).

2. The petitioner has contended that a licence for retail sale of country liquor had been granted in favor of his father by order dated 17.10.1973 by Respondent No. 2. Said licence had been subsequently transferred in the name of Petitioner on the death of his father, under order dated 31.3.1993. The shop, as such, is being run for over 21 years and there had been no complaints whatsoever in respect of smooth

running of the same. It is contended that a few women and others residing in the recent past had been bent upon to close down said licenced business of the petitioner and had initiated a campaign for the same. It had been politically motivated under the stratagem of political rivals. Said persons had influenced and instigated a few women and residents of village Shivna to close down said licenced business and for said purpose, had undertaken a signature drive.

3. A show cause notice dated 7.5.1994, came to be issued by Respondent No. 2 to the Petitioner, seeking explanation as to why the licence be not cancelled with reference to Sections 54 and 56 of the Prohibition Act, originating from alleged complaints by Women Organizations against the country liquor shop and a resolution passed by Gram Sabha, referring to that, according to orders passed by the Government, licence of the petitioner is liable to be cancelled.

4. Petitioner had tendered his explanatory reply on 23.5.1994 to Respondent No.2. He had submitted that alleged complaints of Women Organizations have been brought about by his political rivals and are politically motivated. Petitioner had denied that Gram Sabha, as alleged, had ever been held for said purpose. He had not received notice for Gram Sabha, nor there had been any announcement by a beat of drums. Signatures of women and others had been taken at the behest of political leaders who had inimical terms with petitioner. Petitioner had pointed out the position that only 230 persons had given their signatures from total population of 14,000 villagers. Under said drive, the political leaders had been supporting business of bootleggers and promoting sale of french polish in the village and that about 20 persons, inclusive of local leaders, had indulged into such activities and that criminal cases have been registered against them referring to their names in the petition. Petitioner had also requested to let him have copies of government resolutions/circulars being relied on, as also had requested for copies of alleged representations/complaints by women organizations and the alleged resolution passed by Gram Sabha. It is submitted that he had not been supplied with said copies at all.

5. The petitioner has referred to that in Writ Petitions No. 580 of 1994 and 859 of 1994, a coordinate bench of this Court at Nagpur, has decided similar matters and quashed and set aside orders, issued by the Collectors of Chandrapur and Yawatmal under which cancellations/shifting of the country liquor shops were directed on complaints by women organizations. Petitioner has produced a copy of a writ issued pursuant to said orders. Petitioner has contended that although the show cause notice had made reference to Sections 54 and 56 of the Prohibition Act, yet the impugned order refers to Section 142(1) of the Prohibition Act and as such, the impugned order is an action in excess of the provisions referred to in the show cause notice and is without jurisdiction. Petitioner has contended that the show cause notice, as well as the impugned order, are vague and without material particulars of the basis on which the same have been issued.

6. affidavit in reply have been filed on behalf of Respondents No. 2 and by Respondent No. 3. It is submitted that the circulars and directions issued by the Commissioner of State Excise and such other authorities are not amenable to be made available being confidential in nature. Respondent No.2, though has made a reference to the representations made by the women organizations, has not produced any of the same. So is the case with Respondent No.3 who too has not produced copies of representations against the country liquor shop of the petitioner. Respondent No. 2 has accepted that the show cause notice has been issued, referring to Sections 54 and 56 of the Act. Respondents purported to deny that Gram Sabha was not convened, however, have failed to produce on record any resolution as contended. It is contended by Respondent No.2 that one more show cause notice dated 23.5.1994 had been issued by him to the petitioner, however, the same had not been replied to nor complied with. Interestingly, said show cause notice too, has not been produced by Respondent No.2. Respondent No. 2 has supported his action under the impugned order for it apprehended danger and disturbance to public peace based on complaints by women organizations from running of country liquor shop of petitioner and tried to justify his action u/s 142(1) of the Prohibition Act.

7. From the affidavit in reply by Respondent No. 3 one thing certainly emerges is that there had been no resolution by Gram Sabha for directly closing down the country liquor licenced shop of the petitioner. Though respondent No. 3 has vehemently contended that Gram Sabha had been held and it had craved liberty to produce the notice of Gram Sabha and its proceedings, Respondent No. 3 has not been able to produce the documents for almost last over 18 years. Respondents have generally denied the contentions and allegations in the petition. Except replies filed by the respondents, no documents have been produced on record by the answering respondents.

8. We have heard Shri Monish Nilawant, learned Advocate holding for Shri S.B. Talekar, learned Advocate for the petitioner and Shri K.G.Patil, learned A.G.P. for the Respondent State ,at quite some length.

9. It is contended that the show cause notice had been unsustainable, as it had been issued under political pressure exerted by the persons referred to in the writ petition with the aid of so called women organizations. The show cause notice itself did not have any foundation save and except the political pressure. It has further been contended that though show cause notice had been issued with reference to Sections 54 and 56 of the Prohibition Act, the impugned order has been passed u/s 142 of the said Act. Such an exercise of powers cuts across the very purpose underlying the noble principles of natural justice. The impugned order is arbitrary, in breach of principles of natural justice, capricious, encroaching upon the licenced business being carried on by the petitioner and has political overtones. It is not the objective satisfaction of the authority concerned, but the ill intention of the

politically motivated group which has impelled the issuance of show cause notice as well as the impugned order. It is submitted that reference to Section 142(1) of the Prohibition Act is absolutely uncalled for and the authority concerned cannot exercise the powers u/s 142 of the Act.

10. The learned Counsel for the petitioner has placed reliance on a decision rendered in Writ Petition Nos. 1029 and 1030 of 2006 on 18.7.2006 in the matter of Maharashtra Wine Merchants' Association vs. State of Maharashtra and ors. reported in 2007 (3) Bom. C.R. 343, wherein it has been held that usage of words "to maintain law and order" by the authority was mechanical and without application of mind and on the opinion of someone else and hence, unsustainable. Learned Counsel for petitioner objects to purported exercise of powers u/s 142 as referred to in the impugned order, alleging it to be outside the powers and authority.

11. It would be pertinent to note that for an erroneous reference to the particular provision under the impugned order would not render the exercise without power or authority, if such power and authority is otherwise available under the provisions of the Prohibition Act. The impugned order is not liable to be faulted with on this count, as contended by the counsel for the petitioner.

12. Show cause notice had been issued referring to Sections 54 and 56 of the Prohibition Act. The textual contents of the said provisions are as under:

54. Power to cancel or suspend licenses and permits.

(1) The authority granting any licence, permit, pass or authorization under this Act may for reasons to be recorded in writing cancel or suspend it,

(a) if any fee or duty payable by the holder thereof is not duly paid;

(b) if the purpose for which the licence, permit, pass or authorization was granted ceases to exist;

(c) in the event of any breach by the holder of such licence, permit, pass or authorization or by his servant or by any one acting with his express or implied permission on his behalf of any of the terms or conditions of such licence, permit, pass or authorization or of any licence, permit, pass or authorization previously held by the holder.

(d) if the holder thereof or any person in the employ of such holder or any person acting with his express or implied permission on his behalf is convicted of any offence under this Act or if the holder of the licence, permit, pass or authorization is convicted of any cognizable and non bailable offence or [of any offence under the Dangerous Drugs Act, 1930 or under the Drugs Act, 1940 or under the Bombay Drugs (Control) Act, 1952] or under the Indian Merchandise Marks Act, 1889, or of any offence punishable u/s 482 to 489 (both inclusive) of the Indian Penal Code, or of any offence punishable under Article 8 of the Schedule to section 167 of the Sea

Customs Act, 1878.

(e) if the licence, permit, pass or authorization has been obtained through wilful misrepresentation or fraud.

(2) Where a licence permit pass or authorization held by any person is cancelled, under subsection (7), the authority aforesaid may cancel any other licence, permit, or pass or authorization granted or deemed to have been granted to such person under this Act.

(3) Notwithstanding anything contained in this section, the State Government may, for reasons to be recorded in writing, suspend or cancel any licence, permit pass or authorization.

56. Cancellation for other reasons.

(1) Whenever the authority granting a licence, permit, pass or authorization, considers that it should be cancelled for any cause other than those specified in section 54, he may cancel it either

a) on the expiration of not less than fifteen days" notice in writing of his intention to do so; or

(b) forthwith without notice, recording his reasons in writing for doing so.

(2) Where a licence, permit, pass or authorization is cancelled under subsection (1), a part of the fee for the licence, permit, pass or authorization proportionate to the unexpired portion of the term thereof and the deposit made by the holder thereof in respect of such licence, permit, pass or authorization shall be refunded to him after deducting any amount due from him to the State Government.

13. However, while the impugned order came to be passed, reference has been made to Section 142(1) of the Prohibition Act, which reads as under:

142. Power of Collector to close place where intoxicant or hemp is sold in certain cases.

(1) If the Collector is of opinion that it is in the interest of public peace to close any place in which any intoxicant or hemp is sold it shall be lawful for the Collector by an order in writing to the persons holding a licence for the sale of such intoxicant or hemp to require him to close such place at such time or for such period as may be specified in the order.

14. Section 142 of the Prohibition Act refers to powers of Respondent No.2 for closing of a place for a specified period and subsection (2) of the same also speaks of the powers of Executive Magistrate or Police Officer to close the place also for a specified period in the order.

15. In the present case, the petitioner's father and after his death the petitioner had been running the licenced business for over a period of 20 years smoothly and without any complaints. It appears that apprehension has been expressed and entertained by the authorities concerned on the so called complaints of women organizations and the alleged resolution by Gram Sabha about which no record has been available and as such, the impugned order had been issued without any basis therefore .

16. The exercise of powers under Sections 54 and 56, or for that matter, Section 142 of the Prohibition Act, is regulated by the provisions thereunder. It would be apparent that none of the circumstances referred to under clauses (i) (a) to (e) of Section 54 had been subsisting while show cause notice had been issued, nor the reasons referred to under the show cause notice appear to be based on any material. The show cause notice has been vague and appears to have been issued on presumption of there being resolution by Gram Sabha and complaints by Women organizations.

17. Thus, it appears that there had been no attributable cause for intended cancellation of the licence issued to petitioner as could be considered u/s 56 of the Prohibition Act. While show cause notice called for explanation against cancellation of licence, the impugned order dated 22.7.1994 refers to a different demand of shifting of shop to some other place.

18. There is no coherence in the show cause notice and the impugned order. The impugned order appears to have been passed on subjective satisfaction on non subsisting material and for a different reason about which the petitioner did not get opportunity to tender explanation.

19. The impugned order, however, speaks about cancellation of the licence which is not according to Section 142 of the Prohibition Act and as such, the impugned order cannot be sustained even on that ground. The purported exercise of powers exceeds periphery of the circumstances referred to under Sections 54, 56 and 142 of the Prohibition Act, and would not be compatible with the regulatory provisions.

20. Over all situation points out that the show cause notice and the impugned order did not have the prerequisites for the issuance which is apparent since neither the representations of the women organizations nor the resolution of Gram Panchayat or Gram Sabha has ever been produced, inasmuch as absolutely no record has been placed before this court justifying the issuance of the show cause notice, as well as the impugned order. The show cause notice and the impugned order as such are arbitrary and capricious and deserve to be set aside. The grounds on which show cause notice and the impugned order are being justified, do not appear to have any factual basis. The impugned order cannot be sustained and is liable to be quashed and set aside.

21. Accordingly, the impugned order dated 22.7.1994 is quashed and set aside. We make it clear that this order would not come in the way of the authorities and it would be open for them to take an action according to law, if occasion so arises.

22. Petition is thus allowed. Rule made absolute in aforesaid terms. No order as to costs.