

(2013) 04 BOM CK 0018

In the Bombay High Court

Case No : Criminal Writ Petition No. 146 of 2013

Hotel Legend Inn

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 16-04-2013

Acts Referred:

Bombay Police Act, 1951 — Section 131, 162, 162(2), 33
Bombay Prevention of Gambling Act, 1887 — Section 4, 5
Constitution of India, 1950 — Article 19, 19(1), 19(1)(a), 19(1)(g), 19(2)

Citation : (2013) ALLMR(Cri) 1806

Hon'ble Judges : R.C. Chavan, J;Prasanna B. Varale, J

Bench : Division Bench

Advocate : S.A. Dharmadhikari, with Mr. K.N. Shukul, for the Appellant; M.K. Pathan, APP for State, for the Respondent

Judgement

R.C. Chavan, J.—Rule. By consent made returnable forthwith. This petition questions the order passed by the Commissioner of Police, Nagpur on 3rd December, 2012 and the order of the Principal Secretary, Home passed on 24th February, 2013 whereby those Authorities held that the petitioner's license for running a lodging house in the name of "Hotel Legend" was liable to be cancelled.

2. Facts, in the context of which the present challenge is raised, are as under:

The petitioner holds a license for running a lodging house issued on 15th January, 2010, which seems to have been renewed subsequently. On 1st September, 2012 one Anurag Shukla check into the hotel at about 8.30 p.m. and he was allotted room No. 212. On 2nd September, 2013 about 20 minutes past mid-night, on receipt of information that gambling activity was going on in the petitioner's hotel, the police party conducted a raid, in which police party found 13 persons in room No. 212 gambling with the help of playing cards. Cash of Rs. 3,42,350/- seems to have been recovered from them in the raid. Anurag Shukla was not found in the room, which was found to be occupied by 13 other persons. An offence was registered and it appears that the persons who were gambling in

the room have been prosecuted by filing an appropriate chargesheet before the Magistrate's court.

A notice was issued on 29th October, 2012 to Manmohansingh Kohli, possibly the owner of the hotel, to show cause as to why the license issued for running a lodging house should not be cancelled in exercise of powers u/s 162(2) of the Bombay Police Act. This notice was replied on behalf of the owner by the present petitioner on 8th November, 2012. After considering the reply filed by the petitioner, the Deputy Commissioner of Police, Nagpur by his impugned order dated 3rd December, 2012 cancelled the lodging house license. The petitioner filed appeal against the said order before the Hon''ble Minister in the Government of Maharashtra. This appeal seems to have been decided by the Principal Secretary, Home Department on behalf of the Minister by her impugned order dated 22nd February, 2013 whereby she dismissed the appeal. Aggrieved thereby, the petitioner is before us.

3. We have heard Shri Subodh Dharmadhikari, learned Senior Counsel for the petitioner and Mr. Pathan, learned Additional Public Prosecutor for State and have gone through the reply filed on behalf of respondent No. 2 -the Deputy Commissioner of Police.

4. It was first contended by the learned APP that since the question pertains to cancellation of license by quasi judicial order, appropriate remedy was to file civil writ petition before the learned Single Judge of this Court and that the criminal writ petition is not tenable. The learned counsel for the petitioner submitted that the petitioner has rightly filed a criminal writ petition since what is challenged is a punishment imposed upon the petitioner by cancellation of his license. He relied on the judgment of this Court in M/s. Nagpur Cable Operators' Association Vs. Commissioner of Police, Nagpur and another, where a Division Bench of this Court had considered this aspect of the matter and observed in para 21 of the judgment that "criminal writ petitions would also cover those writ petitions which arise out of the orders and matters relating to prevention or breach of peace or maintenance of peace and order or such orders aimed at preventing vagrancy contemplated to be passed." The learned counsel submitted that the license has been issued in exercise of Regulations made u/s 33 of the Bombay Police Act, 1951. The Section is titled as "power to make rules for regulation of traffic and for preservation of order in public place, etc" The learned counsel, therefore, submitted that since Regulation to issue a license was made for preservation of order in public places and since the impugned orders are passed cancelling such license granted, a criminal writ petition would lie. In our view, since what is challenged is cancellation of a license granted under Regulation made u/s 33 of the Bombay Police Act, this petition is properly filed as a criminal writ petition and the objection on this count raised by the respondent is untenable.

5. The learned counsel for the petitioner next submitted that action impugned was uncalled for in view of the provisions of Section 162 of the Bombay Police Act. Subsection (2) of Section 162 of the said Act provides for suspension or

revocation of the licenses or permissions granted, if any, if the conditions or restrictions is infringed or avoided by the person, to whom such license has been granted. The learned counsel then submitted that even according to the respondents there is no infringement on the part of the petitioner or the owner of the hotel. According to him, in fact the infringement, if any, is by receptionist at the hotel. Learned counsel submitted at Bar that the receptionist in question as also the General Manager working in the hotel at the relevant time have been made to resign. He submits that it would be improper to attribute to the owner of a hotel responsibility for everything that happens in one of the rooms in the hotel at a particular point of time. He submits that the owner cannot obviously keep a track of all activities in a hotel, such as one run by the petitioner, where there are about 40 rooms. The learned counsel also points out that in para 18 of the affidavit-in-reply filed by respondent No. 2, it is categorically stated that the petitioner is not held criminally liable for the gambling activity at room No. 212 on the early hours on 2nd September, 2012 and that only legal action u/s 162 of the Bombay Police Act is taken. The learned counsel submits that thus, the respondents stated that the petitioner is not responsible for the activities in the room No. 212 on 2nd September, 2012 and therefore, the petitioner could not be subjected to any action u/s 162 of the Act. The learned APP submitted that Explanation u/s 162 is very clear. It may be useful to reproduce the entire section with its explanation for ready reference as under:

162. Licences and written permissions to specify conditions, etc., and to be signed.- (1) Any licence or written permission granted under the provisions of this Act shall specify the period and locality for which, and the conditions and restrictions subject to which], the same is granted, and shall be given under the signature of the competent authority and such fee shall be charged thereof as is prescribed by any rule under this Act in that behalf.

Revocation of licences, etc.- (2) Any licence or written permission granted under this Act may at any time be suspended or revoked by the competent authority, if any of its conditions or restrictions is infringed or evaded by the person to whom it has been granted, or if such person is convicted of any offence in any matter to which such licence or permission relates.

When licence revoked, etc., grantee to be deemed without licence.- (3) When any such licence or written permission is suspended or revoked, or when the period for which the same was granted has expired, the person to whom the same was granted shall, for all purposes of this Act, deemed to be without a licence or written permission, until the order for suspending or revoking the same is cancelled, or until the same is renewed, as the case may be.

Grantee to produce licence, etc., when required.- (4) Every person to whom any such licence or written permission has been granted, shall, while the same remains in force, at all reasonable time, produce the same if so required by a Police officer.

Explanation.-For the purpose of this section any such infringement or evasion by, or conviction of, a servant or other agent acting on behalf of the person to whom the licence or written permission has been granted shall be deemed to be the infringement or evasion by, or as the case may be, conviction of, the person to whom such licence or written permission has been granted.

6. The learned APP submitted that if infringement is by a servant or other agent acting on behalf of the person to whom license has been granted, it shall be deemed to be infringement or evasion by the person to whom the license is granted and therefore, according to the learned APP the argument that infringement was by a petty servant should not be accepted. Though the learned Senior Counsel for the petitioner submits that there may be difficulties for the petitioner or owner of a hotel like the one which the petitioner runs to control the activities of all his servants, it would not be possible for us to accept the contention that the Explanation cannot be invoked to fasten the liability on the owner of the hotel. The learned Senior Counsel next submitted that for invoking the Explanation it had to be shown that the servant or agent was acting on behalf of licensee, in the act which amounted to infringement of conditions of license. Learned counsel submitted that it cannot be shown that the receptionist, who allotted the room to Anurag Shukla had permitted his 13 accomplices to enter the room or who had failed to note that gambling was going on in room No. 212, was in fact acting on the behalf of the licensee. We are afraid even this argument cannot be accepted for the disastrous consequences which would flow from accepting such a submission. It would be the responsibility of the licensee to ensure that his agents and servants are not remiss in their duties and ensure that all the terms of license are duly fulfilled. If we were to accept such a submission, every employer or licensee may recklessly allow infringement of conditions of license to occur in his establishment and sacrifice menials when that infringement is noticed. Therefore, this argument cannot be accepted.

7. The learned counsel for the petitioner next submitted that the petitioner has a right guaranteed in Article 19(1)(g) of the Constitution to carry on trade and restrictions on this right cannot be imposed in a manner which would obliterate the right itself. He submitted that when the penalty imposed is disproportionate to the infringement, it would amount to obliteration of the right. He submitted that infringement of terms of license can be dealt with u/s 162 of the Bombay Police Act, which provides for suspension or revocation of license and Section 131 of the Act which provides for penalty for contravening the rules u/s 33. There is no doubt, that the license in question was issued to the petitioner in exercise of powers under Regulation made u/s 33 of the Bombay Police Act. The license itself contains a note that contravention of any such rules would render the person liable to be punished u/s 131 of the Bombay Police Act with fine which may extend to Rs. 50/- (which has now been increased to Rs. 500/-). The learned counsel, therefore, submits that when an infringement can attract consequences ranging from fine of Rs. 500/- to cancellation of license, the Authorities would have to show that they dealt with the infringement

appropriately according to the gravity of the infringement. Infringement in this case is that of Clause 12 of the license which provides that no person keeping a place of public entertainment shall allow in such place gaming or any other act which constitutes an offence under the Bombay Prevention of Gambling Act, 1887.

8. The learned counsel for the petitioner sought to draw our attention to a judgment of Supreme Court in *State of Andhra Pradesh Vs. K. Satyanarayana and Others*, on the question as to whether any gambling was in fact going on in room No. 212. First, in our view, if the petitioner claims ignorance about what was happening inside room No. 212 at the relevant time, such pleas would not be open to the petitioner. Secondly, since the persons concerned are being prosecuted in a criminal Court, it would be for that Court to decide whether activity in question amounted to an offence under the provisions of Bombay Prevention of Gambling Act, 1887.

9. Coming back to the question whether the Authorities were justified in imposing the ultimate penalty of revocation of license in the circumstances disclosed, we may note the argument of learned APP that the orders passed are not arbitrary. He pointed out that it is not the first occasion when such an activity had been noticed in the petitioner's hotel. The order dated 3rd December, 2012 clearly refers to an earlier incident dated 15th August, 2010 when Crime No. 3763/2010 was registered for the offence under Sections 4 and 5 of Bombay Prevention of Gambling Act, 1887 which was alleged to have occurred in the petitioner's hotel. He, therefore, submitted that since it was the second occasion of infringement in the petitioner's hotel, it could not be said that the penalty of revocation of license imposed was disproportionate to the delinquency or infringement. It is worthy of note that even in the notice dated 29th October, 2012, issued by the Deputy Commissioner, the fact that on an earlier occasion similar activity was found to be going on in the petitioner's hotel had been brought to the petitioner's notice and it is equally note worthy that in the reply filed by the petitioner there is no denial regarding this fact. On the other hand, it is stated that as far as Crime No. 3763/2010 is concerned, petitioner was not aware about the same and never permitted such things to happen.

10. The learned Senior Counsel for the petitioner relied on judgment of the Supreme Court in *Om Kumar and Others Vs. Union of India*, to support his contention that the administrative action has to be decided on the principle of proportionality. The case arose out of proceedings for imposition of higher quantum of punishment in departmental enquiries on officers of the Delhi Development Authority. In this context, the Court examined various facets of the Administrative Law and observed in para 52 to 56 as under:

52. In the Indian scene the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action. We have already dealt with proportionality and legislation.

Now, we shall deal with administrative decisions and proportionality.

53. Now under Articles 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the statute concerned permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of "proportionality", just as it is done in the case of the main legislation. This, in fact, is being done by our Courts.

54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of "proportionality" in the last fifty years even though it has not been expressly stated that the principle that is applied is the "proportionality" principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of "approved films" was questioned. The restriction was held reasonable [See R.M. Seshadri Vs. The District Magistrate, Tanjore and Another,]. Union of India v. Motion Picture Assn. also related, inter alia, to the validity of licensing conditions. In another case, an order refusing permission to exhibit a film relating to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a) (S. Rangaraian v. Jagjivan Ram)- Cases of surveillance by police came up for consideration in Malak Singh v. State of P & H. Cases of orders relating to movement of goods came up in Bishambhar Daval Chandra Mohan and Ors, v. State of LLP There are hundreds of such cases dealt with by our Courts- In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the Courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the Courts did not call this proportionality but it really was.

55. In Ganayutham, the above aspect was left for further discussion, however, we are now pointing out that in administrative action affecting fundamental freedoms, proportionality has always been applied in our country though the word "proportionality" has not been specifically used.

56. We may point out that in Israel, the Supreme Court of Israel has now recognised "proportionality" as a separate ground in administrative law - different from unreasonableness. It is stated that it consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such means that do not injure the individual more than necessary. And third, the injury caused to the individual by the exercise of the power should not be

disproportional to the benefit which accrues to the general public. Under this test, the Court recently invalidated several administrative actions (See De Smith, Woolf, Jowell, first Cumulative Supplement to Judicial Review of Administrative Action, 1998, p. 114).

11. The learned Senior Counsel submitted that in view of above observations, the penalty imposed would have to pass the test of proportionality, particularly, in the context of the fundamental freedoms guaranteed under Article 19 of the Constitution.

12. The learned Senior Counsel also relied on another judgment of the Supreme Court in *Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others*, to support his contention that the "doctrine of proportionality" would have to be adhered to in imposition of administrative penalties. The Court had observed that Courts would have to see that the Administrative Authorities maintain a proper balance in respect of adverse effect of administrative orders on the rights of persons keeping in mind the purpose, which such orders were intended to serve.

13. We have carefully considered this argument, as also the argument of the learned APP that since this was the second infringement on the part of the petitioner, there was no violation of principle of proportionality in the penalty which is imposed. However, on a perusal of the orders impugned, it is difficult to fathom as to whether the Authorities considered the question of what penalty should be imposed in the context of the infringement alleged. Therefore, without commenting on the question as to whether the penalty imposed failed the test of proportionality, we would only observe that on this aspect the Authorities do not seem to have applied their mind.

14. The learned counsel for the petitioner next submitted that the impugned orders must be quashed and set aside because neither Commissioner nor Home Secretary gave the petitioner any personal hearing before passing the impugned orders. He submitted that petitioner was entitled to be heard personally before such orders were passed, in view of the judgments of this Court in *Kana Nagu Mhatre Vs. Assistant Commissioner of Police, Panvel Division, Navi Mumbai* and another, and the latest one in *Writ Petition No. 6035/2012 (Mrs. Balbir Kaur Padam w/o Hardeep Singh V/s. The Police Commissioner, Civil Lines, Nagpur and others, decided on 18th December, 2012*. In *Kana Nagu Mhatre (supra)*, the learned Single Judge of this Court was considering the question of revocation of license for running an eating house. The license was cancelled by an order of Assistant Commissioner of Police and the appeal was also dismissed. In that case, there was as many as 21 cases under the Prohibition Act filed against the licensee. When the premises were raided, the raiding party had noticed that lady waitresses and customers were engaged in immoral and obscene act. In this context, this Court observed in paras 7 to 9 as under.

7. Then we turn to the Order of the Appellate Authority viz., the Secretary to the Government of Maharashtra, Home Department (Appeals & Security). After

having carefully perused the said order with the assistance of the learned Assistant Government Pleader, I am satisfied that the Order is totally perfunctory and the result of mechanical application of mind. Paragraph 7 of the Order deals with the contention as to breach of principles of natural justice urged by the Petitioner. This contention has been summarily rejected by saying that the Petitioner had not sought a personal hearing. It is time that the Authorities below become alive to the fact that any order which takes away the livelihood of a citizen infringes his fundamental rights guaranteed under Articles 19(1)(g) and 21 of the Constitution of India. Such an order could only be upheld if it imposes reasonable restrictions on such fundamental rights. Such orders have to be passed with the utmost sense of responsibility. The orders of the two Authorities below are wholly perfunctory and not based on any material to support the conclusions drawn.

8. In these circumstances, I am constrained to quash and set aside both the Order of A.C.P., Panvel Division, Panvel, dated 29th January, 1996 and the Appellate Order of the Secretary to the Government of Maharashtra, Home Department (Appeals & Security) dated 16th February, 1996.

9. Though the Order of cancellation of Eating House Registration Certificate made against the Petitioner has been quashed and set aside, it shall be open to the authority to hold a fresh enquiry against the Petitioner pursuant to the Show Cause Notice dated 16th January, 1996. He shall hold enquiry in which he shall record evidence - both oral and documentary - in support of the allegations in the Show Cause notice, giving an opportunity to the Petitioner to meet such evidence by cross-examining persons deposing against him and leading evidence in defence. Considering the nature of the serious allegations made in the present Writ Petition, the A.C.P., Panvel Division, Panvel, would be well advised to permit the Petitioner to be represented by an advocate in such enquiry. After conducting such an enquiry, the A.C.P. may, on the basis of the evidence collected by him, pass an appropriate order in accordance with law.

15. Relying on this judgment, in Writ Petition No. 6035/2012 the learned Single Judge held that opportunity of hearing before suspension of license was required to be given. In both the cases orders impugned had been set aside.

16. On the other hand, learned APP submitted that a personal hearing was not warranted by the Rules and therefore, there was sufficient compliance of the principles of natural justice by giving a notice to the petitioner and passing order after considering his replies. He submitted that the judgments of the learned Single Judge of this Court, on which the petitioner placed reliance, had not considered the judgment of Supreme Court in the State of Assam and Another Vs. Gauhati Municipal Board, W. Section 298 of the Assam Municipal Act empowered the State Government to dissolve a Municipal Board after giving the Board an opportunity for submitting explanation in regard to the matters in question. The State Government had issued a notice to the Board, which contain 8 charges. The Board gave an explanation, which the Government considered,

and then superseded the Board by the orders impugned. One of the grounds raised before the High Court was that the State Government had not followed the principles of natural justice inasmuch as the Board had been denied an opportunity of being heard. The High Court held that the proceedings were quasi judicial and that there was violation of principles of natural justice. On appeal, the Supreme Court held that there was compliance of the provisions of Section 298 of the Assam Municipal Act. The Court observed that when the Board had not sought an opportunity of personal hearing or for production of materials in support of its explanation, the principles of natural justice did not require that the State Government should ask the Board to appear for a personal hearing and to produce materials in support of the explanation. Supreme Court then proceeded to allow the appeal. The learned APP submitted that in view of this judgment, which had not been considered by the learned Single Judges on whose judgments the learned counsel for the petitioner relied, there was no necessity for the Commissioner of Police or the State Government to offer a personal hearing, which had not been sought by the Board. Therefore, according to the learned APP there is no violation of principles of natural justice in not giving personal hearing to the petitioner.

17. We have carefully considered the submissions based on the judgment of Supreme Court as well as judgments of this Court. There can be no doubt that a party does not necessarily have a right of personal hearing, unless the Rules so provide. There can also be no doubt about the proposition that if a party wants to be heard personally it would be for such party to claim a personal hearing and ordinarily, the Authority need not on its own offer personal hearing. However, in this case the question is not of compliance of a statutory provision but of violation of a fundamental right. Even according to the reply of the respondent, petitioner is not sought to be made criminally liable for the activities detected in the hotel. The question as to whether the petitioner could be attributed knowledge of activities inside the room allotted to customer was required to be considered. Further, the penalty that would be imposed ranging from one u/s 131 of the Bombay Police Act of fine of Rs. 500/- to suspension or revocation of license, the Authority ought to have considered as to what penalty would be appropriate in the light of infringement in this case and for this purpose should have heard the petitioner. True, there have been 2 alleged incidents of gambling in the petitioner's hotel but the petitioner is not held criminally liable for those incidents even by the Authorities. In the light of this, the question as to whether the petitioner could be visited with ultimate penalty by revocation of license, which would prevent him from carrying out his trade, needs to be considered. In view of this, we allow the petition and set aside the orders passed by the Commissioner of Police on 3rd December, 2012 and the Principal Secretary on 24th February, 2013 and direct the Commissioner of Police to take a decision afresh on the show cause notice issued after affording an opportunity of personal hearing to the petitioner and after considering the question of proportionality of the proposed penalty.

Rule is made absolute in above terms.