

(2025) 05 BOM CK 0224

In the Bombay High Court, Nagpur Bench

Case No : Writ Petition No. 3903 Of 2024

Mayur Madan Jaiswal

APPELLANT

Vs

State Of Maharashtra, State Excise, Mumbai, Through Its
Secretary & Ors

RESPONDENT

Date of Decision : 05-05-2025

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Maharashtra Prohibition Act, 1949 — Section 142, 142(1), 142(2), 142(3)

Citation : (2025) 05 BOM CK 0224

Hon'ble Judges : Nitin W. Sambre, J;Vrushali V. Joshi, J

Bench : Division Bench

**Advocate : V.S. Undre, Sayajee Jagtap, Sahil S. Dewani, D.V. Chauhan, N.S.
Rao, A.V. Band**

Final Decision : Dismissed

Judgement

In both the petitions, the order impugned is passed in exercise of powers under sub-section (2) of section 142 of the Maharashtra Prohibition Act, 1949 (for short "the Act of 1949") whereby the Police Officer has exercised the powers so as to close down the liquor shops.

2. At the outset, it is pertinent to determine the issue about the maintainability of the petition before the Division Bench in view of the objection raised by the learned Government Pleader with the learned Assistant Government Pleader.

3. The same has to be determined in wake of the decision of the learned Single Judge of this Court in Writ Petition No. 2707/2024 (Buldhana District Licensed Liquor Association through its Authorised Representative Shri Gopal s/o Babulal Chaudhari Versus State of Maharashtra, through the Principal Secretary, Department of State Excise, Mumbai and others), decided on April 23, 2024 whereby it is held that in case if the order under Section 142 of the Act of 1949 is questioned, the challenge is maintainable before the Single Judge.

4. Shri. D.V. Chauhan, learned Government Pleader with Shri. N.S. Rao, learned Assistant Government Pleader drawing support from Buldhana District Licensed Liquor Association (*supra*) submits that the learned Single Judge has taken a view that the orders passed under Section 142 of the Act of 1949 are in the nature of quasi-judicial. As such, the writ petition lies before the Single Judge by virtue of Rule 18(20) incorporated under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960. He has invited our attention to paragraph no. 18 of the foregoing judgment which is quoted as under:

"18. In the circumstances, in view of the judgment in the case of National Indian National Congress (I) Vs. Institute of Social Welfare and others (*supra*), through there is no lis or two contending parties in this case before the Collector, the decision rendered by the Collector is a quasi-judicial decision and not an administrative decision."

5. For deciding the aforesaid issue, it is a condition pre-requisite to find out whether the impugned order is a judicial, quasi-judicial or an administrative order.

6. So as to decide the issue in controversy the connotation of the word 'quasi-judicial act' needs a legal audit.

7. The landmark decision of the Apex Court in the matter of Province of Bombay vs. Kusaldas S. Advani (1950 SCC OnLine SC 26), discusses at length the distinction between the judicial and administrative acts and has further laid down certain tests for ascertaining whether the act of a statutory body is a quasi-judicial or an administrative act. The following conditions have to be complied with for an act to fit into the definition of quasi-judicial act: (1) The body of persons must have legal authority; (2) the authority should be given to determine questions affecting the rights of subjects; and (3) they should have a duty to act judicially.

8. From the aforesaid definition it is imperative to interpret the word 'duty to act judicially'. For the same, our attention is invited by Shri. Dewani, the learned counsel appointed to assist the Court to the decision of the Apex Court in Radeshym Khare & another Versus State of Madhya Pradesh & Others (1958 SCC OnLine SC 43), wherein after analyzing various decisions, certain tests have been laid down in paragraph 25 so as to interpret 'a duty to act judicially' viz. (1) whether there is a lis inter partes; (2) whether there is a claim (or proposition) and an opposition; (3) whether the decision is to be founded on the taking of evidence or on affidavits; (4) whether the decision is actuated in whole or in part by questions of policy or expediency, and if so, whether in arriving at the decision, the statutory body has to consider proposals and objections and evidence; and (5) whether in arriving at its decision, the statutory body has only to consider policy and expediency and at no stage has before it any form of lis.

9. Section 142 of the Act of 1949 reads as under:

"142. Power of Collector to close place where intoxicant of 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 license 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.

(2) If a riot or unlawful assembly is imminent or takes place it shall be lawful for any Executive Magistrate or Police Officer who is present to direct that such place shall be closed and kept closed for such period as he thinks fit and in the absence of any Executive Magistrate or Police Officer the person referred to in sub-section (1) shall himself close such place.

(3) Any order given under this section shall be final.”

10. It is a settled position of law that the licence to run a business of liquor is a privilege and not a right [Rajendrakumar s/o Shailendrakumar Dixit and others Versus State of Maharashtra and others, (2016 (6) Mh.L.J 290)]. Plain reading of Section 142 of the Act of 1949 does not mandate compliance with the principles of natural justice. The powers vested in the Collector under Section 142(1) are temporary powers. The Collector has to form an opinion based on the material placed before it so as to maintain public peace. The premises is operated pursuant to the licence granted under the Act of 1949 for such period or time as is specified in the order. Sub-section 2 of Section 142 of the Act of 1949 confers powers in Executive Magistrate or Police Officer to close and keep closed for such a period as he/they think fit a place from where the sale of intoxicant or hemp is carried out in case if a riot or unlawful assembly is imminent or takes place. Such power also appears to be contingent and the consequences are non-permanent or in alternate or temporary.

11. At this point, it is of essence to consider the observations of Justice Kapur in *Radeshym Khare & another* (supra) in paragraph 41 wherein it is held that wherever the legislature intended an enquiry to be held before taking any action by necessary implication or in express manner, provision is made to allow an aggrieved person be heard. Generally speaking, excepting where an order is to be reversed qua a particular person, there is no provision for a hearing. The nature and extent of regulatory powers of the State Government and the mode of their exercise are matters of policy and expediency and indicate the taking of an administrative action by the State Government and not the exercise of any judicial power.

12. An order under Section 142 is in the nature of emergency action which envisages closing of any place for specified time and/or period, in which any intoxicant or hemp is sold so as to protect public peace. Section 142(2) also contemplates a prompt action by the Police Officer or Executive Magistrate in the cases of riots or unlawful assembly. There is no duty to act judicially because in arriving at its decision, the Collector, Police Officer or the Executive Magistrate

has to only consider the policy and expediency and at no stage has before it any form of lis. The administrative order is related to the regulation or supervision of the matters as distinguished from an order which decides the rights of the parties as held in *Shankarlal Aggarwala and others Versus Shankarlal Poddar and others* (AIR 1965 SCC 507), and an order under Section 142 fits the above-mentioned criteria. Therefore, we are of the opinion that the order passed under Section 142 of the Act of 1949 is of administrative nature as it does not fulfill the tests laid down to determine a quasi-judicial act viz. there is neither a lis nor duty to act judicially (as section confers powers to act administratively) nor opportunity of hearing is contemplated under the aforesaid section. We are fortified in our view by the decision of the Apex Court in the matter of *Radeshym Khare & another* (supra), paragraph 50 and 51 of the same reads as under:

"50. The very fact that an order under Section 53-A is in the nature of an emergency action to protect the interests of the rate payer and has a limited duration not exceeding 18 months also negatives the order being founded on an objective determination as to the incompetency of the committee. Such a construction will defeat the very purpose of Section 53-A. Further action under Section 57 is of a permanent nature and has accordingly been expressly made subject to an explanation by the municipal committee. The absence of such a provision from Section 53-A clearly shows that the legislature did not intend that there should be an elaborate hearing but intended that the State should under Section 53-A take a swift administrative decision. The correct position, as indicated above, is that the decision of the State Government as to incompetency and the decision as to the action to be taken were really one decision, one integrated whole — a subjective decision of the State Government that it considered that by the appointment of an executive officer a general improvement in the hitherto general administration was likely to be secured. Merely because the fact of incompetency is a preliminary step to the exercise of an administrative function by the State Government, under Section 53-A, it is not necessary that the fact is to be determined judicially. Where the exercise of the administrative functions of an executive authority like the State Government are subject to a decision as to the existence of a fact, there is no duty cast on the State Government to act judicially. Both the decision as to the fact and as to the action to be taken are really one and not two decisions, the determination being for the purpose of taking an appropriate administrative decision. As has been said above it is one integrated whole and cannot be separated into parts with different legal qualities. This was the view of Kania, C.J., in the *Province of Bombay v. Kusaldas Advani* [(1951) AC 66, 78] where it was observed at p. 633:

"Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a power conferred on it, the determination of the objective fact and the

exercise of the executive power based thereon are alike matters of an administrative character”.

51. Fazi Ali, J., in that case said at p. 642:

“For prompt action the executive authorities have often to take quick decisions and it will be going too far to say that in doing so they are discharging any judicial or quasi-judicial functions. The word ‘decision’ in common parlance is more or less a natural expression and it can be used with reference to purely executive as well as judicial orders. The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference, and the real test is : Is there any duty to act judicially?”

13. As a sequel of above reasons, we do not agree with the conclusion arrived at by the learned Single Judge in the matter of Buldhana District Licensed Liquor Association (supra) that the order under Section 142 is a quasi-judicial order. We are of the opinion that the above-cited pronouncement is per incuriam as the authoritative pronouncement in the matter of Radeshyam Khare & another (supra) was not brought to the notice of the learned Single Judge. The Hon’ble Supreme Court in K.H. Siraj Versus High Court of Kerala and others ((2006) 6 SCC 395), has opined that the decision made by the High Court without reference to the relevant decisions of the Supreme Court was a per incuriam decision. We are declaring the view taken by the learned Single Judge in the matter of Buldhana District Licensed Liquor Association (supra) to be per incuriam for the reason that the judgment in the matter of Radeshyam Khare and another (supra) was not brought to the notice of the learned Single Judge which led to the view of the learned Single Judge being contrary to the judgment of the Apex Court.

14. Sub-section (3) of Section 142 contemplates that the order passed under Section 142 is final qua the statutory provision. In such an eventuality, the remedy of appeal or other remedies expressly provided under the Statute are not available as the order under Section 142(1) or 142(2) attains finality qua the Statute. In such an eventuality, the only remedy available to the person aggrieved is to take recourse to the constitutional remedies viz. writ under Article 226/227 of the Constitution of India.

15. Hence, the preliminary objection raised by the learned Government Pleader with the learned Assistant Government Pleader is rejected. It is held that the writ petition challenging the order passed under Section 142 of the Act of 1949 is maintainable before the Division Bench only.