
(2007) 07 BOM CK 0108

In the Bombay High Court

Case No : Letters Patent Appeal No. 93 of 2007

Pramilabai Prabhakar Bulbule

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Bombay Prohibition Act, 1949 — Section 137, 138, 34, 54, 56
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 166, 166(1), 226, 26

Citation : (2007) 6 BomCR 601 : (2007) 5 MhLj 657

Hon'ble Judges : Joshi A.H., J; Chavan R.C., J

Bench : Division Bench

Advocate : P.C. Madkholkar, for the Appellant; Bharti H. Dangre, AGP for respondent Nos. 1 to 6, for the Respondent

Judgement

Joshi A.H., J.—Rule. Rule is made returnable forthwith and is heard by consent.

2. Parties are not on dispute as to the facts of the case. In the judgment under appeal, learned Single Judge has narrated the facts in para 10 and 11 of the impugned judgment as under:

10. The facts of the present case demonstrate that on 9.2.1974 Government sanctioned Foreign Liquor Licence in favour of petitioner's husband, but the then Police Commissioner, Nagpur informed that there were two offences against the said Prabhakar in relation to his Raj Beer Bar. On 29.5.1974 it was informed that since 1967 to 1974, 17 offences under Bombay Prohibition Act, were registered against Prabhakar and in relation to some offence trial was going on. Police also communicated that there was involvement in stealthy sale of psychotropic substances. The Superintendent, State Excise also informed the State Government not to sanction FL-II licence to him. Thereafter, Prabhakar on 2.1.1975 moved Hon'ble Minister and at that time Superintendent, State Excise had again communicated his opinion on 7-6-1975 and it was informed that unless and until there is favourable order, Prabhakar was not eligible for FL-II

licence. It was also informed that 4 offences under Sections 66(b) and 65(e) of Bombay Prohibition act were registered against Prabhakar and liganacy in respect of his Ra Beer Bar was also cancelled. He was also detained under the Internal Security Act on 31.5.1975. The facts above clearly show that Government had not taken any decision finalising to release of FL-II licence in favour of deceased Prabhakar. Receipt of favourable police report was essential for releasing such FL-II licence and no such favourable report came to be submitted till the death of Prabhakar. Orders dt. 30.5.1998 mentioned above concluded the issue of revalidation finally against petitioner.

11. It appears that after the orders were passed on 9.10.2004 the department prepared a note pointing out in detail the above facts and pointed out that licence was not at all in existence in favour of Shri Prabhakar. It was further mentioned that there was no application made by petitioner on 2.2.1989, and no such copy was available in records of Nagpur Office or with Government. It is lastly mentioned that orders passed on 9.10.2004 are therefore not in accordance with law and the department therefore suggested its review. The note also states that orders dt. 9.10.2004 therefore, cannot be issued to parties and re--hearing of matter is necessary. It is mentioned by office, that the Hon''ble Minister should rehear the matter and reject it. It appears that thereafter, the matter was heard by the successor Hon''ble Minister and impugned orders have been passed on 22.2.2006. [Quoted from Page Nos. 26 to 28 of Writ Petition Paper Book)

3. The learned Single Judge dismissed the writ petition. Findings recorded by learned Single Judge in paras 13 to 14 can be summarized as below:

(a) Before the action or decision is expressed in the name of the Governor, in the manner prescribed under Business Rules and communicated to the party concerned, it would have always be open by necessary implication to the Chief Minister to send for the file and have it examined by himself and to take a decision, though the subject was allotted a particular Minister for convenient transaction of the business or the Government.

(b) Though the subject may be exclusively allotted to the Minister, by reason of the responsibility of the Chief Minister to the Governor and accountability to the people, he has implied power to call for the file relating to the decision taken by a Minister.

(c) It has been observed that the order is to be expressed in the name of Governor, as required by Clause [1] of Article 166 and then only it has to be communicated. Until such an order is drawn up by the State Government in accordance with Article 166(1), the State Government cannot be regarded as bound by what was stated in the file.

(d) In view of dictum in the case of Kedar Nath Bahl Vs. The State of Punjab and Others, the expression of order in the name of Governor as required by Article 166 of the Constitution and communication thereof to a party affected thereby

are conditions precedent for the order to bind the Government. In that case the order though initially was made by the Minister, the order of confirmation was cancelled by the Chief Minister before it was communicated and Hon"ble Apex Court has upheld the order of cancellation. In paragraph No. 17, the Hon"ble Apex Court says that till the order is drawn in the name of Governor and communicated to the affected person, action of Government is not final.

[Points (a) to (d) are drawn from paragraph No. 13 of impugned order]

(e) Thus considering the controversy in this background it is apparent that the order dated 9.10.2004 has not been drawn as required by the provisions of Business Rules and admittedly has not been served upon the present petitioner. She got it only under Right to Information Act. Therefore, is not binding upon the State Government.

(f) Perusal of the judgment i.e. Patel Narshi Thakersi and SBP and Company (supra), show that power of review is not an inherent power. However, in the facts of the present case, it cannot be said that by passing and communicating the order dated 22.2.2006 the respondents have reviewed the orders dated 9.10.2004. As already held above, the order dt. 9.10.2004 itself reviewed the earlier order dated 30.5.1998 passed against the petitioner by the State Government. Therefore, argument of want of power of review is not helpful to the petitioner.

[Point Nos. (e) and if) are drawn from para 14 of impugned Judgment]

4. Learned Advocate Mr. Madkholkar for the petitioner re-iterated on his submissions advanced before the Single Judge and further urged that:

(a) The judgment of the learned Single Judge was based on primary assumption by learned Single Judge that the order impugned was passed in routine executive business of the Government, lest the learned Single Judge could not have held that the procedure laid down in Article 166 of the Constitution was liable to be strictly followed.

(b) Learned Single Judge lost sight of the fact that order impugned in the writ petition was passed in exercise of quasi judicial exercise of powers, functions and duties conferred under provisions of statute on the State Government, and were performed by Minister for the Government, and therefore, it was not a business of collective responsibility of cabinet or of responsibility of Hon"ble Chief Minister.

(c) The jurisdiction exercised by Hon"ble Minister was in fact and in law of the powers derived under a statute, and therefore, review would not be permissible unless the law, by which the jurisdiction has been conferred, permits.

5. Learned Advocate Mr. Madkholkar placed reliance on various judgments which are discussed in paras to follow.

6. 1999 (Supp.) Bom.C.R.194 : 2000(3) M.L.J. 585, (Krusnhnarao Vitthalrao Gollar v. State of Maharashtra and Ors.), (a judgment of Single Judge):

This judgment is relied upon by the appellant to urge that the power exercised by the authorities u/s 138 needs to be exercised judicially. The observation in this regard is in para No. 11, which can be referred by quotation, which reads as follows:

The Prohibition Officer, while exercising these administrative powers under Sections 54 and 56 of the Act, are under duty to act fairly and under the scheme of the Act, any order and/ or proceeding can be examined by the authorities u/s 137 by way of appeal, and u/s 138 in exercise of the powers of revision by the State Government and obviously these are judicial acts and rules of natural justice would squarely apply. The authorities acting judiciously are under obligation to act with impartiality and fairness. Any decision taken by the authorities in the appeal/ revision is subject to judicial review.

7. i. Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, , and ii. Aribam Tuleswar Sharma Vs. Aribam Pishak Sharma and Others, 4:

These two judgments are relied upon by the appellant to urge as to the scope of review and to urge that review has to be on error apparent on the face which could be noted on mere looking on record and without any long term process of scrutiny and reasoning. It would be fruitful to refer by quotation paras 8 and 9 of the judgment in case of Meera Bhanja (Smt) supra which read as follows:

8. ...It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. In connection with the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review, the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleswar Sharma v. Aribam Pishak Sharma Aribam Tuleswar Sharma Vs. Aribam Pishak Sharma and Others, speaking through Chinnappa Reddy, J., has made the following pertinent observations: (SCC p. 390, para 3).

It is true as observed by this Court in Shivdeo Singh v. State of Punjab, there is nothing in Article 26 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definite limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the

subordinate Court.

9. Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the Superior Court to issue such a writ.

8. i. Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , and ii. Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, :

These two judgments are relied upon by the appellant to impress once again as to the scope of review, and we think that any further and detailed discussion is not necessary.

9. Commissioner of Police, Bombay Vs. Gordhandas Bhanji, :

This judgment is relied upon by the appellant to urge the attributes of fairness and openness etc. in the matters of executive business and we think that any detailed discussion on this judgment is not necessary.

10. State of Maharashtra and Others Vs. Basantilal and Another, :

This judgment is relied upon by the appellant to urge that the power exercisable by the Minister of State passing an order against the order of Commissioner of Excise in revision petition u/s 34 of Bombay Prohibition Act, is in exercise of quasi judicial power. Since it is not an executive order, it does not require authentication. It shall be useful to refer the quotation contained in para 4, 5 and part of para 6 which are quoted below:

4. ...The question, therefore, for our consideration is whether a quasi judicial order made under the provisions of a statute by a Revisional Authority who is also a Minister in the State Cabinet, requires authentication under Article 166.

5. It is an admitted fact that the order made by the Minister concerned was a revision petition filed against the order of the Commissioner of Excise who himself was entertaining a petition before him under the provisions of the Act sitting as a quasi judicial authority. It is also an undisputed fact that executive authorities also, if so empowered under an authority under a statute, sitting as a quasi-judicial authority result in the quasi-judicial order which can never be termed as an executive order requiring authentication under Article 166 of the

Constitution of India.

6. The High Court in the impugned order relied on a judgment of this Court in *Gulabrao Keshavrao Patil and Others Vs. State of Gujarat and Others*, .

which in turn was based on an earlier Constitution Bench judgment of this Court in *Bachhittar Singh Vs. The State of Punjab*, .

We have perused the said judgments and find that the law laid down therein has no application to the facts of the case in hand. In neither of the two judgments of this Court referred to herein above, this Court has held that a quasi-judicial order made by an executive authority sitting as an appellate or Revisional Authority under a statute can be construed as an executive order. Therefore, in our opinion, the High Court fell into an error in construing the order made by the Minister, impugned in the writ petition, as an order requiring authentication under Article 166 of the Constitution.

11. Learned AGP in reply urged that:

(a) whether or not the business undertaken by the Minister was in exercise of ordinary executive business or exercise of jurisdiction, and authority conferred upon under any statute, the orders needed authentication, and therefore, the judgment of the Single Judge cannot be faulted.

(b) The impugned order passed by the Minister by which the order namely order dated 9-10-2004 was reviewed itself was passed in review, and therefore, no fault could be attributed to the exercise of power by the Hon"ble Minister.

(c) The power of review was inherent.

12. Learned AGP, however, was not successful in laying hand on any express or implied power of review available in the statute or any other provision empowering review jurisdiction as inherent power.

13. Considering the findings and submissions, the questions which arise for consideration of this Court are as follows:

[1] Whether the order passed by the Hon"ble Minister which was impugned in Writ Petition was passed in exercise of quasi judicial power conferred upon the Minister under the statute or it was a routine executive business.?

2] Whether the Minister had power of review the order dated 9-10-2004 on the ground that it was not proclaimed as contemplated under Article 166 of Constitution of India?

14. We have given due consideration to the Judgments cited at bar and upon considering all the submissions advanced by the learned Advocate for the petitioner, we find that the conclusions which are inevitable in view of the reported judgment in *State of Maharashtra and Others Vs. Basantilal and Another*, which is a binding precedent are as follows:

[a] The order passed by the Hon"ble Minister u/s 138 of the Bombay Prohibition Act, was in exercise of quasi-judicial power.

[b] The power exercisable u/s 138 of the Bombay Prohibition Act, being a quasi-judicial power, the order did not require authentication under Article 166 of Constitution of India.

[c] The order impugned was passed in review, for which the jurisdiction did not vest in the Hon"ble Minister, as the scheme of the Bombay Prohibition Act does not envisage or provide or enable any review jurisdiction.

[d] Though the order which was reviewed itself was as for reviewing an order passed in review, it was not a case of a lis between two individuals where one individual is aggrieved by the wrong review, and applies for rectification by way of prayer for recalling of order passed earlier in review.

[e] The State is not a party to list, and therefore, there was no occasion to review and recall the order, though former order which was latter reviewed was itself rendered in a review.

[f] The State has not become successful in demonstrating that in the judgment which was reviewed by impugned suffered from an error apparent on the face of record.

15. The question as to the nature of power exercised by the Minister being concluded by the precedent of Apex Court, and our having recorded as done in the foregoing para, no further and detailed discussion seems to be necessary for this Court to reach the conclusion that the foundation of judgment of Single Judge impugned is on the prepositions of law are based on error as to power of review and error of law in properly recognizing the nature of power to be exercised by Minister while deciding a revision application u/s 138 of the Bombay Prohibition Act.

16. In the result, we are satisfied that the judgment under appeal deserves to be set aside by allowing appeal and by further making the Rule absolute, the judgment and order impugned is set aside. Rule in the Writ Petition No. 5091 of 2006 is made absolute in terms of prayer Clause (A) with further direction that the order passed by the Minister on 9-10-2004 is restored, and we direct that the consequences thereof shall follow. Parties are directed to bear own costs.