(2001) 11 BOM CK 0001

In the Bombay High Court

Case No : Appeal From Order No. 454 of 2001

Pratap Balkrishna Kedari APPELLANT

Vs

Premadevi Laxminarayan Agarwal RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 182
Specific Relief Act, 1963 — Section 37

Citation : AIR 2002 Bom 319 : (2002) 3 BomCR 46

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.P. Kanuga, A.A. Irani and Rupali N. Kedari, for the Appellant; Veera B. Thadani and Meena A. Ruparel, for the Respondent

Judgement

A.M. Khanwilkar, J.—Ms. Thadani appears for the respondent and points out that the respondent has received notice from the Registry of this Court dated September 29, 2001 which was served on him on October 30, 2001 stating that the appeal would be taken up for hearing on any date after 14 days of the receipt of the said notice which period is not yet over. This submission however, overlooks the fact that the said notice is a formal notice issued by the registry after admission of the appeal pursuant to the order dated June 29, 2001. Undoubtedly, the respondent has already entered appearance through Advocate before this Court who is pursuing this appeal from the first date of hearing on May 24, 2001 and the said Advocate represented the respondent even on September 28, 2001 when this Court directed that the hearing of this appeal is expedited and to be posted for final hearing in the week commencing from October 22, 2001. That direction was issued having regard to the fact that the appellant is more than 70 years of age. Undisputedly, the respondent was fully aware of the said order. Accordingly, the notice issued by the registry of this Court on September, 29, 2001 will have to be ignored especially in view of the order passed on 28th September, 2001, which fact is not disputed. In the circumstances, Advocates appearing for both sides were called upon to proceed with the hearing of the appeal. Appearance of Mr. Dani has been shown by the registry. It is relevant to point out that Mr. P.S. Dani had appeared in the past on instructions of Ms. Thadani, Advocate who is the Advocate on record. Office to delete the appearance of Mr. P.S. Dani from the record. It is not her (Ms. Thadani''s) grievance that she was not informed regarding today''s date of hearing, but has only brought the above facts to the notice of this Court lest the respondent should not make grievance that the appeal has been heard before the period mentioned in the notice served on him on October 30, 2001. In fact Ms. Thadani was personally present on 28th September, 2001, when this Court expedited the hearing of this appeal. As observed above, the said notice issued by the registry will have to be ignored in view of the order passed by this Court on early hearing application on 28th September, 2001 in the presence of the Counsel for the respondent. Accordingly, this appeal would proceed for hearing on merits forthwith.

2. Heard both sides.

3. This appeal takes exception to the order passed by the II Joint Civil Judge, Senior Division, Pune, dated April 30, 2001 below Exhs. 5 and 7 in Special Civil Suit No. 332 of 2001.

4. The respondent has filed the abovesaid suit against the appellant for specific performance of an agreement dated May 11, 2000 and for direction against the appellant to abide by the terms and conditions of the said agreement. The respondent has further prayed for injunction against the appellant restraining him from transferring the subject CL III Licence No. 269 in favour of any third person or giving right to any person to run the said business conducted in 445, Ganesh Peth, Pune without prior permission of the respondent and to inform the Superintendent, State Excise in that behalf. The respondent further prays for mandatory injunction against the authorities to renew the subject liquor licence from April 1, 2001 to March 31, 2002 and also thereafter on year to year basis and directing the appellant to make application through challans and handing over the appellant''s signature to the respondent for the purpose of renewal of licence or for income tax clearance without any delay. The respondent further prays that if the appellant fails to comply his obligation under the agreement the respondent be allowed to obtain necessary permission through Court Commissioner to be so appointed by the Court and to direct Superintendent, State Excise to accord permission in favour of the respondent.

5. During the pendency of the said suit, respondent filed application Exh. 5 praying for grant of interim injunction against the appellant from transferring the said CL III No. 269 in favour of any third person or creating right or interest in favour of any other person to run the business under the agreement and to restrain from transferring the business without the respondent''s prior permission and intimation to the authorities. The respondent filed another application Exh. 7 praying for interim mandatory injunction directing the appellant to get the

licence renewed for the period from April 1, 2001 to March 31, 2002 and for future years periodically by making application and complying with all necessary formalities for the purpose of renewal of licence and to inform the Superintendent of State Excise in that behalf. By this application the respondent further prayed that if the appellant fails to perform his obligation under the agreement, the Court may appoint Court Commissioner through whom the respondent would make necessary application to the authorities for renewal of the licence and to issue appropriate direction to the authorities in that behalf. The trial Court by the impugned order has allowed the said applications by passing the following order :

"1. Exh. 5 and 7 are hereby allowed.

2. The defendant is hereby restrained from transferring, assigning or creating any third party interest in respect of country liquor licence CL III bearing No. 269 in favour of any person which has been issued at licenced place 445, Ganesh Peth, Pune during pendency and final disposal of the suit.

3. The defendant is further directed by interim mandatory injunction to renew country liquor licence for the period 1-4-2001 to 31-3-2002 and for future year to year period, making application, filing form, challans by handing over the same with his signature to plaintiff for the purpose of renewal of licence including documentation of income tax clearance, affidavit, etc. or other documents which may be required by licencing authority during the pendency and final disposal of the suit.

4. If the defendants fail to comply above directions plaintiff is at liberty to get it done through Court Commissioner that may be required to be appointed.

5. Cost of this application shall follow the cost in cause."

6. The main argument in this appeal, on behalf of the appellant-original defendant, is that the law permits third person to conduct the business on behalf of the licensee but on certain conditions. Reliance has been placed on condition No. 7(1) which mandates that the licensee himself or by any agent or servant duly authorised by him in this behalf, namely, written Nokarnama in the prescribed form signed by him and countersigned by the Prohibition and Excise Officer not lower in rank than the Sub-Inspector, can carry on the business under the licence. It is submitted that Nokarnama duly signed by the appellant and countersigned by the Prohibition & Excise Officer in favour of the respondent has admittedly expired on March 31, 2000 and from which date the respondent cannot claim any right to continue to do the business on behalf of the appellant in any capacity. It is further submitted that the subject agreement is onerous one and has been obtained from the appellant under misrepresentation. It is contended that appellant''s father, who was the original licensee died in May 2000, whereas the agreement was got executed by the respondent on May 11, 2000. According to the appellant, in any case, the said agreement is illegal being opposed to public policy for which reason the respondent cannot assert any claim

on the basis of such invalid document and that no Court could grant relief in favour of respondent relying on such agreement. In support of this contention reliance has been placed on the decision of this Court reported in Kondaram Sheriar Irani and others v. Damodar Shripal Bagal and another, 1986 M.L.J. 829. Reliance is also placed on the unreported decision of this Court of Justice A.P. Shah dated October 5, 1998 in Writ Petition No. 3699 of 1997, Raghunath J. Khandelwal v. Collector of Pune and others.

7. On the other hand, the Counsel for the respondent has adopted the reasons given by the trial Court to support the injunction order passed by the trial Court against the appellant. According to the respondent it is legitimate to do business under country liquor licence through an agent and that the subject agreement was one such agreement which created agency in favour of the respondent coupled with interest. According to the respondent if the agreement is considered as a whole, it bestows the status of an agent and it does not in any way infringe the mandatory requirement of the law or can be said to be opposed to public policy. The Counsel for the respondent further submits that the decisions relied upon on behalf of the appellant can be distinguished because in the former case it was a partnership agreement; whereas in the later case the document in question was a power of attorney. However, in the present case, it is purely an agency agreement which is permissible in view of condition No. 7(1).

8. Having regard to the rival submissions, the first question which needs to be addressed is :what is the purport of condition 7(1). Condition No. 7(1) read thus :

"7(1) The licensee shall carry on the business of the shop either personally or by agents or servants duly authorised by him in this behalf by a written Nokarnama in form C.L. XVIII signed by himself and countersigned by a Prohibition and Excise Officer, not lower in rank than a Sub-Inspector provided that, any such Nokarnama signed by the licensee shall be valid, until countersignature is refused, by the licensee, the Nokarnama shall be forthwith withdrawn. For every Nokarnama issued by him, the licensee shall pay in advance into the Treasury a fee of rupee one. No Nokarnama shall be issued to any person under 21 years of age, and no such Nokarnama, if issued, shall be valid. The licensee shall be responsible for breach of any of the condition of this licence or that of the rules committed by this agents or any person in his employment."

9. On plain reading of this provision, it would appear that it mandates that the licensee shall carry on the business of the shop either personally or by his agent or servant duly authorised by him in this behalf by written Nokarnama in prescribed form signed by himself and countersigned by the specified officer. No doubt, this provision refers to the expression "agent". An agent would be one who is authorised by the licensee to act for or in place of him. In the context of the scheme of the extent rules relating to liquor licence we will have to hold that such person can have no independent right in the licence, for if we were to hold to the contrary it would tantamount to legitimating the transfer of rights under the licence to such third person. The expression "agent" occurring in this

provision will have to be given a limited meaning. This view is reinforced by the stipulations under form CL VII which is to be signed by the licensee as well as to be countersigned by the specified authority only when such person can claim to be the agent of the licensee so as to become entitled to do the business. The prescribed form clearly provides that the person who actually conducts the business on behalf of the licensee has no independent right in the said business but is doing so entirely on instructions and at the pleasure of the licensee. In other words, so long as the licensee permits such a person to conduct the business only till such time he can continue to do the business.

10. In the present case, there is no written Nokarnama in favour of the respondent after March 31, 2000. The right to conduct the business in favour of third person (agent) would accrue only by virtue of the Nokarnama (in the prescribed form) duly signed by the licensee and not otherwise. The agreement cannot be accepted a substitute to the Nokarnama, as any agreement transcending beyond the stipulations under the Nokarnama would be of no avail as the agent is allowed to conduct the business only for the limited purpose. The Counsel for the respondent, however, contends that ordinarily the authorities would not refuse to countersign the written Nokarnama. To my mind this submission is besides the point. No doubt the authorities would ordinarily countersign the Nokarnama. Nevertheless, while doing so the authorities are obliged to find out as to whether the nature of arrangement is one of simplicitor agent or servant or otherwise. In other words, only when the specified authority is satisfied about the nature of arrangement that of agent or servant to do the business, without any other right in the licence, that the countersign would be granted. The law clearly prohibits transfer of any right in the licence without obtaining prior permission of the authorities. Understood thus, the Nokarnama is the crucial document and it alone can be the basis on which a person can claim right to conduct the business on behalf of the licensee. In absence of Nokarnama duly signed by the licensee and countersigned by the specified authority in accord with the mandate of condition 7(1) no person can do the business on behalf of the licensee. The grievance of the parties will have to be now considered in the light of these principles. Indubitably, the respondent concedes that the Nokarnama executed by the appellant in favour of the respondent has expired on March 31, 2001. In that sense, the respondent has no authority to conduct the business or to interfere with the business of the appellant after that date. What is, however, contended before this Court is that if the terms and conditions of the subject agreement were to be enforced then the respondent would be entitled to do the business. To my mind, an agent can remain to continue to do the business so long as the principal permits him to do so. There can be no agreement that the principal shall perpetually allow the agent to conduct the business irrespective of his intention to withdraw from that arrangement.

11. The next question that needs to be addressed is what is the nature of the subject agreement executed between the parties. On plain language of the

agreement and more particularly from Clauses (f) and (i) it would be seen that the respondent has assumed complete authority unto himself to do the business as sub-licensee. This arrangement virtually amounts to transferring the rights and obligations under the licence in favour of the respondent for a consideration quantified at Rs. 2,100/- only as a royalty fee. The learned Counsel for the respondent fairly concedes that the respondent does not claim right to do business under this agreement, but only because of the Nokarnama signed by the appellant and countersigned by the specified authority which, however, expired on March 31, 2000. I am, of the view that this agreement by itself cannot create any right in favour of the respondent. Moreover, assuming that the agreement has been executed by the parties, but the fact remains that the terms of the agreement virtually result in transferring the licence right in favour of the respondent, which is prohibited by law unless prior permission in that behalf is obtained from the concerned authorities. It is not disputed that such permission has not been obtained. The fact that the authorities had countersigned the Nokarnama in favour of the respondent in the past would be of no avail. Countersigning the Nokarnama in the past by the authorities can in no way amount to approving the subject agreement, for the said agreement was not the subject matter of consideration at the relevant time. So long as the authorities have not permitted the transfer of the licence in favour of the respondent and, in any case, the respondent is not claiming right in that behalf, obviously he cannot claim any independent right to continue to do the business under the subject licence. Applying the principle underlying the decision of this Court in the case of Kondaram Irani''s as well as Raghunath''s case (supra), the respondent cannot claim any right to do the business in his own rights. To my mind if his claim is one of agent then the fact that the principal (Appellant) is no more interested in executing a fresh Nokarnama in his favour is sufficient enough to deny him any relief. On the other hand if his claim is on the basis of the subject agreement then, prima facie, the said agreement will have to be held as illegal and void and cannot be enforced. Even for this reason the respondent cannot get any relief. The trial Court was therefore, wrong in granting injunction in favour of the respondent.

12. In the circumstances, the trial Court was completely in error in allowing the application Exhs. 5 and 7. To my mind the approach of the trial Court, as is seen from para 12 of the order, is completely erroneous and cannot be sustained for the above said reasons.

13. In the circumstances, this appeal succeeds. The impugned order is set aside and the applications Exhs. 5 and 7 are dismissed with costs.

In view of the above order, the Civil Applications filed in this appeal, do not survive.

