

(2018) 10 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 3255 Of 2018

Rasik B Shah

APPELLANT

Vs

Inspector State Excise, O - Division, Mumbai (Suburbs) And
Others

RESPONDENT

Date of Decision : 05-10-2018

Acts Referred:

Maharashtra Prohibition Act, 1949 — Section 9, 44, 78, 138, 147
Constitution of India, 1950 — Article 14, 226, 227

Citation : (2018) 10 BOM CK 0028

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Anil Anturkar, Veena Thadani, Vishal Thadani, Ravi Kadam, Abhay L. Patki, Pralhad D. Paranjape, Ravi Kadam, Abhay L. Patki, Pralhad D. Paranjape, Sukanta Karmarkar, Ravi Kadam, Abhay L. Patki, Pralhad D. Paranjape , Amit Shastri,

Final Decision : Disposed Off

Judgement

S.C. Dharmadhikari, J

1 Rule.Â Respondents waive service.Â By consent, Rule made returnable forthwith.Â The affidavit in reply taken on record.Â The petitioners'

counsel states on instructions, they do not wish to file any rejoinders.

2 By these Petitions under Article 226 of the Constitution of India, the petitioners are challenging the orders passed under the Maharashtra Prohibition

Act, 1949 (for short, 'the MP Act').

3 The petitioners' senior counsel Mr.Anturkar has invited our attention to the facts and circumstances set out in Writ Petition (Lodging) No.3255 of

2018.

4 He would submit that these facts are common to almost every Petition, which is on our Board with some marginal difference.

5 The argument of the senior counsel is that each of these petitioners are licence holders and, under the MP Act so also the rules framed thereunder,

it is a privilege of the State Government to grant permission or licence to sell liquor.

6 At the relevant time, these licenses were subsisting.Â During the course of their subsistence, it was noticed by the authorities that there was a

alleged violation of the terms and conditions of the licence as also of the the MP Act and the relevant rules.Â The incidents narrated are that there

was a sale of liquor, which is not permissible, except by the mode set out in the law and the terms and conditions of the licence. There is nothing

according to the authorities like home delivery of liquor.Â The allegations are that contrary to these conditions, the licence holders indulged in such

home delivery of liquor.Â This was noticed and the Flying Squad was directed by the fourth respondent to the Writ Petitions to seal the premises.Â

Under the oral directions issued by the Commissioner of State Excise (for short, 'the Commissioner), the sealing of the premises took place.Â

Aggrieved and dissatisfied by such act, the petitioners approached the Collector of the concerned District and the Collector, after hearing the

petitioners, firstly, passed an interim order and thereafter a final order allowing the Appeal.Â The Court's attention has been invited to a copy of this

order at page 81 [ExhibitÂ?F] of the paperÂ?book.

7 Further, insofar as the interim order of the Collector is concerned, the Commissioner, on oral directions issued to the Superintendent, called upon him

to file Appeal before herself and she stayed the interim order of the Collector that too, without hearing the petitioners and this resulted in the seal not

being removed and the premises being under lock and key of the authorities.Â Consequently the premises or the establishments could not be reÂ?

opened.Â This conduct continued for after the Collector passed the final order, the Superintendent was directed to prefer an Appeal on that very date

and the Commissioner as an Appellate Authority, stayed the Collector's order.Â It is in these circumstances that Mr.Anturkar would submit that the

petitioners may not possess a fundamental right to sell or deal in liquor, but surely under the privilege granted by the State, if the licences have been

issued and they are in operation, then, so long as they are not cancelled or terminated in accordance with law, there is no power to direct sealing of the premises.Â Further, the mandate of Article 14 of the Constitution of India has been grossly violated by such high handed action.Â The Appellate

Authority having passed an order in favour of the petitioners, that authority cannot then be humiliated or embarrassed by calling upon the subordinate

to such Appellate Authority, namely, the Superintendent of State Excise, to challenge his orders before the Commissioner.Â This means that the

Commissioner has ensured that the injustice to the petitioners is perpetuated and that because her oral directions have not been abided by the

concerned statutory functionary, out of sheer vengeance, she has heard the Appeal and interlocutory applications on that very date and stayed the

order impugned before her.Â This is a mockery of the rule of law.Â Finally, it is urged that even if an Appeal is pending before the fourth

respondent Commissioner, no useful purpose will be served by appearing before her because she has prejudged the issue.Â She is prejudiced and

biased against the petitioners. There is no hope that she would hear the Appeal, uninfluenced by whatever she has done and particularly, her oral

directions.Â In such circumstances, the petitioners should not be directed to undergo an empty formality.Â Now that this Commissioner has made up

her mind, she is bound to pass an order against the petitioners and the final order of the Collector compounding the offences would be set aside by

her.Â Â The hearing will be a farce.Â She would not even consider the contentions, much less the objections to the maintainability of the Appeal.Â

For all these reasons, since an independent adjudication is impossible, then, we should denude the Commissioner or take away the power of Appeal

vesting in the Commissioner and direct some other higher functionary, but under the law, to hear the Appeal.

8 Mr.Kadam appearing on behalf of respondent Nos.1 to 4 invited our attention to the scheme of the the MP Act, and particularly, the power of

control vesting in the Commissioner under Section 9 thereof.Â He would submit that Chapter III contains prohibitory provisions, save and except, in

accordance therewith, no sale or dealings in liquor can be permitted.Â Mr.Kadam would submit that the power to cancel or suspend the licence and

permit is also conferredÂ by this very law and by Section 44 thereof though there are offences carved out within the scheme of this law and prima

facie committed by the petitioners, it is not as if First Information Report (FIR) registered against them would take into consideration only such offences.Â If there are other penal provisions under which offences have been committed, then, unmindful of this position in law, if any compounding of the offences punishable by the MP Act has been allowed by the Collector and he has interfered with the ongoing investigations, that would enable the Commissioner to take up the Appeal of the aggrieved statutory functionary as well.Â It is not as if in the scheme of this law, an Appeal lies only at the instance of the petitioners.Â If all orders passed by the Collector are appealable to the Commissioner, then, all the more we should not accept the contentions of Mr.Anturkar.

9 Mr.Kadam would submit that the petitioners cannot presume and merely because some oral directions were issued at some stage by the Commissioner that she will not give them a fair and reasonable opportunity of placing their case or version before her and would allow the Appeal straight way.Â She would duly consider the objections even to the maintainability of the proceedings/Appeal, so also the arguments canvassed on merits and will definitely pass a reasoned order.Â There is, therefore, no apprehension of justice not being done to the petitioners.Â In fact, the Commissioner is aware of the basic tenets of fairness, equity and justice and that justice should not only be done, but seen to be done.Â She would apply her independent mind and pass an order which is capable of being challenged in Revisional powers and Jurisdiction vesting in that behalf in the State Government.Â However, the petitioners in these petitions have also invoked the powers of Revisional Authority challenging the sealing of their premises and that is enough for dismissing these Petitions on the ground of maintainability as well.

10 Mr.Kadam also contended that no order removing the seal placed on the premises should be passed for that would render the pending Appeal preferred by the Superintendent before the Commissioner infructuous.Â Any mandatory order at an interlocutory stage directing removal of seal on the premises would mean that Appeal itself is disposed of.Â That should not be directed for there are serious violations and breaches of the law and this home delivery of liquor without any permission or prior approval of the statutory authorities and contrary to the terms and conditions of the licence

is a punishable offence for which investigations are in progress.Â The concerned police station, as also the statutory authorities should not be

prevented from investigating these offences and any expression of opinion, on merits, by this Court would hamper the same.Â For these reasons,

Mr.Kadam would submit that these Writ Petitions be dismissed.Â

11 With the assistance of Mr.Anturkar and Mr.Kadam, we have carefully perused each of these Petitions and the orders impugned therein.

12 At the outset, we inquired from Mr.Anturkar as to whether any of the petitioners have approached the State Government and invoked the State

Government's Revisional powers in terms of Section 138 of the MP Act. Mr.Anturkar, on instructions, fairly stated that even if the intervention of the

State Government is sought and by invoking its Revisional powers, the petitioners would withdraw each of the revision petitions and would not press

them.Â The statement is accepted as an undertaking to this Court.Â

13 Secondly, we have noticed that Mr.Kadam has, on instructions, stated that not all the thirty one (31) petitioners before us have valid licences in

their favour.Â The petitioners may be holding licences at one time, but some of these now stand cancelled or terminated.Â Mr.Kadam has therefore

stated that any order and direction beneficial to the petitioners should not enure to the benefit of such of the petitioners, whose licences have been

cancelled.

14 On instructions, Mr.Anturkar fairly stated that the licences of some of the petitioners have indeed been cancelled and they are in the process of

filing or initiating proceedings to challenge this cancellation/termination of licences and nothing should be observed by us, which would prevent them

from seeking interim or final reliefs.Â We clarify that it will be open for the writ petitioners whose licences have been cancelled or terminated to

adopt appropriate proceedings under the MP Act.Â In the event, such proceedings are filed, they shall be decided on their own merits and in

accordance with law.Â Needless to state that any interlocutory orders in such proceedings and/or the applications in that behalf shall be decided

strictly in accordance with law.Â The interim as also the final proceedings shall be disposed of by speaking orders.

15 We also clarify that it is not necessary to decide the larger or wider controversy.Â True it is that Mr.Anturkar has argued that there were oral

directions issued for sealing the premises, it is open for the petitioners to argue before the Commissioner in the pending Appellate proceedings and

even otherwise that no such powers to issue oral directions to seal the premises vests in the Commissioner and that exercise of such powers

contravenes the provisions of law as also violates the mandate of Article 14 of the Constitution of India.Â The contentions to the contrary are also

kept open.

16 It would also be open for the petitioners to contend that the Superintendent of State Excise could not have been directed by the Commissioner or

the Superintendent, on his own as well, could not have challenged the orders, interim or final, passed by the Collector of the concerned District by

instituting an Appeal before the Commissioner and that such Appeal is incompetent or not maintainable.Â It would be equally open to the petitioners

to argue that in terms of the MP Act it is for the State Government to establish the Commissionerate/Collectorate and the Collector passes an order as

a delegate of the State Government.Â Then, such orders ought to be considered to be orders of the State Government.Â Then there is no scope for

anybody, much less a inferior or subordinate in the hierarchy to impugn or challenge them or override them in any manner.Â In the event, such orders

are overridden by a Superintendent level officer, then, the Commissioner ought not to entertain any Appeal at his instance and the pending Appeal

deserves to be dismissed on this ground alone.Â We keep this issue open and we have no doubt that in the event, objections to the maintainability of

the Appeal are taken by raising the aforesaid pleas, the Commissioner will duly consider them and pass an order strictly in accordance with law.Â

Whether the objections are upheld or they are rejected, the reasons for rejection thereof must be spelt out clearly in a speaking order by the

Commissioner.

17 We want to remind the Commissioner that an Appeal, if at all it lies, then, in terms of Section 147 of the Act and which falls under Chapter X titled

as 'Appeals and Revisions', she is an Appellate Authority.Â An Appeal is a creature of the Statute.Â An Appellate Authority ought to apply his

or her independent mind and every order that is challenged in Appeal is open to challenge on facts and law.Â The Appellate Authority like the

Commissioner is not an agent or servant of the State.Â It can apply its

independent impartial mind and deal with such Appeal within the four corners of law. It is not obliged to dismiss it. Equally, respondent No.4 should be aware that in her enthusiasm and zeal to ensure that the MP Act is not flouted, she should be cautious and careful that within the scheme of the very law, she is not just the controlling authority, but equally an appellate body as well.

She is expected by this law to decide a Statutory Appeal uninfluenced by any step or measure taken by her as an Controlling Authority. On this aspect, we may usefully refer to the Division Bench Judgment of this Court rendered in the case of Patesingh Rao Anandrao Naik and Others Vs

R.V.Deshmukh, Joint Director and Joint Registrar Co-operative Societies and Others [1981 Mh.L.J. 936]. The Division Bench held as under :

23. So far as the appellate order is concerned in our opinion there is much substance in the grievance made by Shri Rane. An appeal is provided under section 152 against an order under section 78 of the Act. While dealing with such a contention the Supreme Court in Rangnath v.

Daulatrao and another has observed as under :

As has been repeatedly pointed out by this Court the State Government ought to have disposed of the statutory appeal of the appellant filed under

Section 2A(2) of the Abolition of Inams Act by a speaking order. It may not be possible in all cases to say that a non-speaking order is bad or

invalid on that account alone but when an order is liable to be challenged under Article 226 or 227 of the Constitution of India, Courts do insist that an

appeal of the kind filed by the appellant should be and ought to have been disposed of by a speaking order, giving some reasons in its support.

24. This Court had also an occasion to consider a similar question in Janba Daulatrao Borkar v. Rajeshkumar Ramjuvan Agarwal, Bhimashankar and

others v. State of Maharashtra and Pandit Bhullan Ramshankar Tiwari v. Sarvodaya Vita Kavelu Kumbhar Kam Sahakari Audhooik Utpadak

Sanstha Bina and others.

25. As observed in Pandit Bhullan's case an appeal is a creature of statute. Further there is a vast difference between the revisional powers and the

appellate powers. An appeal, as stated by Lord Davery in Pannamma v. Arumoosa is a proceeding in which a question is whether the order of the

Court from which the appeal is brought was right on the materials which the

Court had before it. In Legal Parlance appeal means judicial examination of the decision by the higher Court of an inferior Court. It amounts to, in essence and pith, a complaint to higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set aside. From this it would follow that an appellate Court has power to go not only into the question of law, but also into questions of fact. Such a power would further enable the appellate Court to review or reassess the entire evidence and come to its own conclusion. Litigant is entitled to a full, fair and independent consideration of evidence and the material at the appellate stage. Under section 152 of the Act, right of appeal is provided in very wide and general terms. The appellate authority has to decide the appeal as a quasi-judicial authority. To say the least the appellate authority cannot act mechanically as a mere rubber stamp. In the present case in memorandum of appeal various substantial questions of fact were raised by the appellants. All these contentions are disposed of by the appellate authority by observing :

"I have gone through the appeal memo, the records produced before me. The Joint Director has given sufficient reasons in para 5 of his order why the action of suppression is necessary. It is not necessary for me again to reproduce all these facts. I totally agree with him. I therefore, pass the following order."

In view of this cryptic order it is difficult to say that there is no substance in the contention raised by Shri Rane. In Siemens Engineering and Manufacturing Company v. Union of India, the Supreme Court has reiterated as to why the order should be speaking one and the authority making such an order in exercise of the quasi judicial function should record its findings with reasons. It appears to be a settled law that where the authority makes an order in exercise of quasi-judicial functions, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. This is what the Supreme Court has observed in Siemens Engineering's case :

"If Court of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunal should accord fair and proper hearing to

the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. The Government of India also failed to give any reasons in support of its order rejecting the revision application. But we may presume that in rejecting the revision application it adopted the same reason which prevailed with the Collector. The reason given by the Collector was, as already pointed out, hardly satisfactory and it would, therefore have been better if the Government of India had given proper and adequate reasons dealing with the arguments advanced on behalf of the appellants while rejecting the revision application. We hope and trust that in future the Customs Authorities will be more careful in adjudicating upon the proceedings which come before them and pass properly reasoned order, so that those who are affected by such orders are assured that their case has received proper consideration at the hands of the Customs Authorities and the validity of the adjudication made by the Customs authorities can also be satisfactorily tested in a superior tribunal or Court. In fact, it would be desirable that in cases arising under Customs and Excise laws and independent quasi-judicial tribunal, like the Income-Tax Appellate Tribunal or the Foreign Exchange Regulation Appellate Board, is set up which would finally dispose of appeals and revision applications under these laws instead of leaving the determination of such appeals and revision applications to the Government of India. An independent quasi-judicial tribunal would definitely inspire greater confidence in the public mind.

26. In the present case the appeal being statutory one and as the appellants had raised substantial questions of fact for challenging the order passed by the trial Court it was obligatory on the part of the appellate authority to pass the reasoned order. This was absolutely necessary in view of the fact that even the Additional Government Pleader and the officers assisting him in Court, in spite of their best efforts, were unable to support some of the

findings recorded by respondent No.1. The order of respondent No.1 shows predetermination and, therefore, in the present case a duty was cast on

the appellate authority to pass a reasoned order, in the background of the allegations made regarding the mala fides. In this view of the matter in our

opinion the order passed in appeal also cannot be sustained.

18 The Commissioner may on coming to know that the law is allegedly violated, then, in exercise of the power of control vesting in her, she may direct

that immediate or emergent steps be taken so as to control the violation of the law. However, when she was aware in this case that the petitioners

were aggrieved by her oral directions of sealing the premises and when they approached the Collector of the concerned District, he stays that step of

sealing the premises initiated by the Superintendent of the State Excise, then, such interim order passed by the Collector should not have been

interfered with by her in a high handed manner. She was required by law to issue notice to the petitioners and hear them and thereafter consider the

issue whether such interim order should be sustained, upheld or set aside. The principles of natural justice as also the principles of fairness and

equity demand that respondent No.4 should act reasonably, fairly and justly.

The law endows and entrusts such functionary with enormous powers. When they wield such powers having far reaching consequences, then such

powers ought to be exercised cautiously and carefully. All powers are in the nature of trust. None can then claim that they are untrammelled,

unrestricted, uncontrolled and unregulated. They are regulated by law. They ought to be aware that the judgments rendered by this Court and the

Hon'ble Supreme Court of India, bind them. They also guide their action. One cannot brush them aside in the manner done. We are, therefore,

most unhappy in the manner in which she has dealt with the order of the Collector, interim as also final. The final order of the Collector

compounding the offences may be erroneous, according to her, but that does not give her any right or power to stay it *ex parte*. It would mean

allowing the Appeal at the interlocutory stage itself. It would mean that the Superintendent of State Excise is forced not to obey the order of the

Collector. She should have at least noted the plight of this Superintendent. The poor fellow does not know whether to implement or abide by the

order of the Collector and invite the anger of this Commissioner, who claims to

be the superior of the Collector, or face disciplinary action from the Collector for having not followed or implemented his direction.Â The Superintendent is not a tool in their hands and the Collector and Commissioner should realise that Superintendents would be seriously handicapped in the event their powers are interfered with.Â This would encourage the alleged wrong doers like the petitioners and they would definitely take advantage of the lack of coÂordination and coÂoperation so also cordiality between high ranking officials. They would enjoy the spectacle and by approaching higher Courts highlighting such matters.Â This exposes the State Government.Â The State Government, as in this case, is finding it difficult then to support or sustain the action of the Commissioner. Today we have an unpleasant scenario where the State of Maharashtra invariably appears before us through the Government Pleader and the Department of Prohibition and Excise through its Secretary is sued by the petitioners in these Petitions.Â He is represented by Mr. Patki, the Additional Government Pleader.Â However, in her uncalled for enthusiasm,Â respondent No.4 has engaged Mr.Paranjape and Mr.Paranjape files vakalatnama, not only on behalf of the fourth respondent, but virtually all the functionaries under the MP Act.Â Now, we do not know whether the Superintendent is supporting the Collector or the Commissioner.Â If all of them are represented by Mr.Paranjape, we do not know whether all of them acted in tandem.Â Â This unpleasant scene should have been avoided by the Commissioner.Â This is not the first occasion that we are reminding the respondentÂ? Commissioner that she is not above the law.Â She may have all good intentions, but this is not the way to implement the law.Â She should be aware that justice should not only be done, but seen to be done.Â The Appellate powers are conferred by the Statute and Appeal is not an empty formality. Therefore, when she has stayed the final order of the Collector on the very date it was passed and that too without hearing the petitioners, we cannot sustain and continue that order.Â That order is passed in gross violation of the principles of natural justice and fair play.Â We set aside the order passed by the Commissioner on 17th September 2018.Â That order is quashed and set aside.

19 We are of the firm opinion that this would be an apt reminder to the fourth respondent.Â She should also know that the petitioners are reluctant to

appear before her and have a serious apprehension that justice would not be done to them by her.Â They have alleged that she has prejudged the issue and is prejudiced against them.Â Pertinently, the factual position as narrated in the Petitions is not disputed or denied by the Respondents including the Commissioner (Respondent No.4).Â She has maintained total silence though personal allegations are levelled against her.Â She has been impleaded as a party respondent by name.Â These are very serious objections and matters and if the allegations against her are sustained, it would have adverse impact on the career of a young official like the fourth respondent, who has long way to go.Â We are mindful of this aspect and do not therefore sustain them only because Mr.KadamÂ assures us that hereafter the Commissioner would not repeat such acts.Â She would mend her ways and Mr.Kadam says that we must give her a chance to do so.Â We do not uphold the objections of Mr.Anturkar, but remind the fourth respondent of her duty and responsibility in law.Â She is expected not to be influenced by anything that has been done in the past, including her oral directions of sealing the premises, her action of entertaining an Appeal of the Superintendent of State Excise and staying the interim order of the Collector as also the final order, all on the same day on which such orders were passed.Â This overÂenthusiasm and overÂzealousness may cost her career itself.Â In such circumstances, when we do not uphold the objections of the petitioners and transfer the proceedings to some other equally ranked and competent official, we remind the fourth respondent that she is expected to perform her duty strictly in accordance with law, uninfluenced by any oral or written order, interim or final, issued by her in the past at the instance of the Superintendent. It is an Appeal by an allegedly aggrieved Superintendent.Â Equally, she may have to decide tomorrow a set of Appeals by aggrieved petitioners or licence holders and who may say that the Collector or other functionary under the law has not rendered justice to them.Â Hence, we hope, expect and equally trust that the fourth respondent has by now learnt a lesson.Â She would now abide by the law.Â She would pass an order after duly noting the petitioners' objections and deal with them in her reasoned order.

20 Since an apprehension is expressed and a serious one by the petitioners, we direct that in the event the fourth respondent passes any orders

adverse to the petitioners, then, such orders shall not take effect for a period of four weeks from the date they are communicated to the

petitioners.Â Since we have set aside the fourth respondent's interim order and for the present not expressed any opinion on the contentions raised

before us, interest of justice demands that the sealing of the premises by the authorities should be set aside.Â Therefore the Superintendent or other

functionary is directed to remove the seal, lock and key placed on the premises forthwith.Â This order will enure to the benefit of such of the

petitioners whose licenses are subsisting and are not cancelled.Â The other licences, which are no longer in operation on account of their termination,

the holders thereof cannot avail the benefit of this order.Â However, we do not express any opinion on the remedies that are available to them and

they can avail them as observed and held in the above paragraphs.

21 We clarify once again that beyond highlighting the controversy between the parties, we have not expressed any opinion on the merits of the

Appeal or the orders terminating the licences.Â All contentions of both sides in that regard are kept open.

22 The Writ Petitions, accordingly, stand disposed of.Â Rule made absolute accordingly.Â No order as to costs.