

(2017) 03 BOM CK 0189
In the Bombay High Court
Case No : 2501 of 2017

Sandesh Shashikant Narvekar

APPELLANT

Vs

The State of Maharashtra & Ors.

RESPONDENT

Date of Decision : 20-03-2017

Acts Referred:

Constitution of India, Article 19(g) -
Protection of certain rights regarding freedom of speech, etc
Bombay Prohibition Act, 1949, Section 139 - General powers of 2[Sta

Citation : (2017) 03 BOM CK 0189

Hon'ble Judges : V.M. Kanade, A.S. Gadkari

Bench : DIVISON BENCH

Advocate : Vinod Joshi, Lata Patne, Vijay Thorat, M.V. Thorat, Vishwajeet Kapse, A. Prabhakar Sharma, Rajesh Dharap, A.B. Vagyani, V.B. Thadani, S.L. Babor, Tintina Hazarika

Judgement

1. Heard Mr. Vinod Joshi, Mr. Vijay Thorat and Mr. Vishwajeet Kapse, the learned Counsel appearing for the petitioners in respective writ petitions and Mr. A.B. Vagyani, the learned Government Pleader appearing for the Respondent-State Government in all writ petitions.

2. The issue involved in the aforesaid petitions is common, hence we propose to dispose of all these writ petitions by a common judgment.

3. Rule. Rule is made returnable forthwith by consent of the learned Counsel for the parties. The learned Government Pleader waives service.

4. The petitioners are seeking to challenge the legality and validity of the impugned Government Resolution dated 28th October 2016 issued by the Government of Maharashtra under the Maharashtra Toddy Shops (Grant of Licences by Auction-cum-Tender) Order, 2001. The petitioners are also seeking to challenge the letter/order dated 31st August 2016, whereby one month renewal has been granted instead of one year.

5. The petitioners are the domicile of State of Maharashtra and are running toddy shops in Mumbai and are also residents of Mumbai. The respondent No.2 is Commissioner State Excise, Maharashtra State and the respondent No.3 is the Collector, Mumbai Suburban District. All the petitioners and their ancestors were holding licences under Section 139 of the Maharashtra Prohibition Act, 1949 and they have been running toddy shops in view of the licences which have been issued by the respondents from time to time.

6. Prior to 2001, these licences were auctioned from year to year and they were allotted in favour of the highest bidders. On 22.11.2000, the State Government constituted a Committee headed by Shri S.S. Tinaikar. The said Committee has submitted its report on 4th June 2001 and the same was accepted by the Maharashtra Government in the year 2001 and a Toddy Order in 2001 came to be issued. Thereafter, the State Government constituted second Committee headed by Shri Ajit Kumar Jain. The Committee headed by Shri Jain submitted its report in July 2008. The said Committee recommended that instead of auctioning licences for year to year, in order to ensure economic stability of the bidder, once licence is granted, it should be renewed from year to year and for maximum period of four years. Thereafter the Order 2001 was amended by the State Government by exercising powers vested in it under various clauses of Section 139 of the Bombay Prohibition Act, 1949. Clause No.3 of the said Order, 2001 reads as under: "3. Procedure for Grant of Licence:-

(1) The licence for shops shall be granted by Auction-cum-Tender system on payment of bid money, by the Collector as specified hereinafter.

(2) The licence shall be granted for a Toddy year and it may be renewed every year, maximum upto four years. (2A) The fees for renewal of licence for the toddy year 2010-2011 shall be equivalent to the fees of licence for the previous toddy year 2009-2010 and the fees of licence for the previous toddy year 2009-2010 and the fees of renewal of licence for any subsequent year shall be increased upto six percent of the fees of licence for the previous year as notified by the Government. (2B) The renewal of licence shall be done before the 1st September of every year.

(3) The licence shall be granted in Form TD-1 as prescribed under rule 4 of the Maharashtra Toddy Shops (Licensing) and Toddy Trees (Tapping) Rules, 1968."

7. The Jain Committee submitted its report in July 2008, suggesting various recommendations and it was recommended that in every five years, once auction-cum-tender procedure should be followed and thereafter there should be renewal of licence for a period of four years. It appears that these recommendations have not been accepted by the Government of Maharashtra and no amendment has been made to the Clause-3 regarding grant of licence. Most of the petitioners had applied for grant of licence and in the year 2014 they were granted licences for one year and these licences were renewed thereafter for one year. The Government of Maharashtra by the Notification dated 28th October 2016 has

noted that by virtue of 2001 Order, the auction-cum-tender procedure was adopted. However, this procedure was reconsidered in 2009-2010 by virtue of recommendations of Shri Ajit Kumar Jain's Committee and from 2009-2010 the auction-cum-tender procedure was followed and for a period of four years thereafter it was continued by increasing licence fees by six percent every year. Since 2013-2014 was the last year for renewal, in the year 2014-2015 a new procedure for auction-cum-tender was followed, in order to ensure that those who were carrying on business on the basis of the licences should not suffer any loss. For the next year i.e. from 2015-2016 those who were successful bidders their TD-1 licences were renewed. However, by Notification dated 28th October 2016, the Government decided to change the earlier procedure by imposing certain restrictions. One of the restrictions was that the TD-1 licence should be granted to person who had 1000 palm-trees. The petitioners are aggrieved by the said condition.

8. The learned Counsel appearing for the Petitioners submitted that, the procedure for grant of licence under Clause-3 of the Order 2001 envisaged that once the licence is granted, it may be renewed every year maximum upto four years. It is submitted that the petitioners' licences being granted in the year 2013- 2014 and the same have to be renewed till 2014, the word "may" used in the said sub-clause (2) of clause-3 of the Order 2001 should be interpreted as "shall" as is recommended by the Jain Committee. In our view, there is no substance in the said contention. It is apparent from plain reading of sub-clause (2) of Clause-3 that the maximum period for which the licence may be renewed is for four years. The word "may" therefore cannot be interpreted as "shall" so as to be mandatory on the part of the licensing authority to renew it for a period of every four years. The Notification dated 28th October 2016 in terms mentions that in 2008 after recommendations of Jain Committee were accepted, the said procedure was followed upto 1.3.2014 and thereafter the Government decided to renew its policy and therefore that was done by Notification dated 28th October 2016.

9. It has to be noted here that, there are three types of licences namely (1) TD-1 licence, (2) TD-2 and (3) TD-3 licence for transportation. It has also to be noted here that, toddy is extracted from Coconut trees and date palm trees. The toddy is extracted in the morning and is not fermented for some time and this liquid/ extract is called as "Neera" and the same is free from alcohol. Thereafter process of fermentation starts and the said "Neera" becomes "Toddy". However, after lapse of particular hours, the said toddy get fermented and becomes intoxicant. TD-1 licence is issued to the shop-keepers who can sell toddy in nonintoxicant condition and it has to be destroyed after 24 hours. In the past, all shopkeepers in Mumbai used to bring toddy from other districts. A survey was made by the Government and it was noticed by the Government that the toddy was mixed with some chemical i.e. Chloral Hydrate and it was sold. Out of 69 cases such adulterations were found in 40 cases out of 1500 shops. The Government therefore took a decision that since there were no toddy Trees in Mumbai so far

as city of Mumbai is concerned, a condition was imposed that unless each shopkeeper owns 1000 trees of palm, date, they should not be given licence. The Government's stand is that there are no toddy producing trees in Mumbai. When the Government issued a Notification in 1993 under which entry of trees in 7 x 12 extract was not necessary. The Government came to the conclusion that since there were no agricultural lands in Mumbai, there were no entries of toddy trees in the 7/12 extract. The Government's stand is that, all shops in Mumbai import toddy from other places such as Palghar, Pune, Ahmed Nagar and by the time it reaches Mumbai, it gets fermented and become intoxicant, which is injurious to health.

10. This Notification is being challenged by the petitioners on various grounds. The said grounds are as under: (i) It is unconstitutional to impose unreasonable restrictions on the requirement of having 1000 trees per shop-keeper.

(ii) The contention of the Government that there are no palm trees in Mumbai, is incorrect. The restriction imposed on the basis of incorrect assessment of trees in Mumbai is arbitrary.

(iii) The said Notification is discriminatory since it discriminates between toddy-shops which sell toddy in Mumbai and in other districts.

(iv) The licence has been issued to shop-keepers who owned 200- 300 palm trees.

(v) There are only two to three workers to tap toddy and it is impossible for them to tap toddy from 1000 trees. Therefore the said condition is unreasonable.

(vi) Once an assurance was given to licensee in year 2014 that the licence would be renewed for four years, the State Government now cannot curtail the said period of four years.

(vii) Lastly, on the basis of 40 samples which were found adulterated, the conclusion cannot be drawn by the State Government in respect of all shopkeepers who sell toddy.

Reliance is placed on the judgment of the Supreme Court in the case of State of Kerala & Ors. Vs. Unni and Anr. [(2007) 2 SCC 365. and particularly paragraphs 32, 33, 34, 36 and 37.

11. On the other hand, Mr. Vagyani, the learned Government Pleader appearing on behalf of the State, submitted that the challenge to the Government Resolution was without any foundation. He submitted that the Government had taken a decision vide Government Resolution dated 28th October 2016 to grant licence only to those shop-keepers of Talukas where 1000 palm-trees have been owned by each licence holder. He denied the contention of the petitioners that toddy licence had to be renewed for a period of four years. It is submitted that by virtue of the said condition, the Government has sought to ensure a pure and unadulterated toddy sale in the shops. It is submitted that the Government has,

while issuing this Notification, overlooked the revenue aspect and considered the interest of the public health. It is submitted that the auction has already been taken place in accordance with new guidelines in respective districts and auction-bidders have been given licences and have started their business. It is further submitted that the said Notification also takes care that the interest of local residents should be safeguarded.

12. After having heard the learned counsel for the petitioners and the learned Government Pleader, we are of the view that it is not possible to accept the contention of the petitioners. We have also noted as to how the said rule regarding granting licence is not mandatory since, the word "may" used in sub-clause (2) of Clause-3 is not mandatory but it is directory. The State Government can either renew licence every year and for a maximum period of four years or may not renew the licence and can also decide whether licences should be given for four years. The recommendations of the Jain Committee were not accepted by the Government while issuing 2001 Order.

13. It is not in dispute that the Government has sole right to frame rules as laid down in Section 139 of the Bombay Prohibition Act, 1949 which gives power to the State Government to frame rules. Section 139 of the Bombay Prohibition Act, 1949 reads as under: "139 [1. Notwithstanding anything contained in this Act or the rules made thereunder, the [State. Government may, by general or special order,-

(a) prohibit the grant of any kind of licences, permits, passes or authorisations throughout the [State. or in any area;

(b) regulate the import, export, transport, possession, sale, purchase, consumption or use of any intoxicant, hemp, mhowra flowers, molasses or any article which is likely to be used for the manufacture of an intoxicant with or without licence, permit, pass or authorisation throughout the [State. or within the limits of any local area subject to such conditions [as it may impose.;

(c) exempt any person or institution or any class of persons or institutions from all or any of the provisions of this Act or from all or any of the rules, regulations or orders made thereunder or from all or any of the conditions of any licence, permit, pass or authorization granted thereunder, subject to such conditions as it may impose;

(d) exempt any intoxicant or class of intoxicants, denatured spirituous preparation, hemp, mhowra flowers or molasses from all or any of the provisions of this Act or from all or any of the rules, regulations or orders made thereunder subject so such conditions as it may impose;

(d1) remit or refund wholly or partially any fee in respect of any privilege, licence, permit, pass or authorization granted under this Act or any duty on toddy producing trees or any excise or countervailing duty or fee leviable under this Act or any intoxicant, hemp, mhowra flowers or molasses from any person or

institution or from a class of persons or institutions from the payment of such duty or fee subject to such conditions as it may impose;

(e) prescribe the maximum number of licences, passes or authorizations of any kind which may be granted in any area or to any class of persons;

(f) prescribe the number of places at which any intoxicant specified in such order, [denatured spirituous preparation., hemp, mhowra flowers or molasses, may be sold in any area, the location of such places in any area, the days and hours during which such places may or may not be kept open, the number of such places in respect of which licences for sale may be granted and the number of such places which may be [managed by the State Government departmentally.;

(g) direct that no licence, permit, pass or authorization of the kind specified in such order shall be granted without the previous approval of the [State. Government or also direct any additions or alterations to be made to or in the conditions subject to which under any other provisions of this Act, such licence, permit, pass or authorization can be granted;

(h) prescribe the maximum quantity of any intoxicant, [denatured spirituous preparation., hemp, mhowra flowers or molasses which may be sold in any area or at any place;

(i) prescribe in respect of any place or area, the maximum number of toddy producing trees for tapping which or for drawing toddy from which licence or licences may be granted;

(j) prescribe the procedure for the disposal of any shop or shops authorised to sell any intoxicant, denatured spirituous preparation, hemp, mhowra flowers or molasses under this Act and the procedure to be followed before granting any licence or licences;

(k) direct that before granting licences, auctions may be held, tenders called for or offers received and that licences shall be granted [subject to such conditions as may be prescribed. to persons whose bids, tenders or offers are accepted by the Collector;

(l) specify the persons or class of persons [to whom licences may or may not be granted. and in cases in which auctions are held, the persons or classes of persons who may or may not be permitted to offer bids at such auctions;

(m) direct that licences of the kind specified in such order shall be granted to persons specified in such order; and

(n) issue such other instructions in any matter pertaining to the grant or otherwise of licence, permits, passes or authorizations under this Act, as the [State. Government may deem proper." Therefore the Government is authorised to regulate import, export, sale, purchase, exemption which includes sell of Toddy. Section 11 of the Bombay Prohibition Act, 1949 regulates manufacturing of intoxicants. Section 11 reads as under:

"11. Notwithstanding anything contained in the following provisions of this Chapter, it shall be lawful to import, export, transport, manufacture [bottle., sell, buy, possess, use or consume any intoxicant or hemp [or to cultivate or collect hemp. or to tap any toddy producing tree or permit such tree to be tapped or to draw toddy from such tree or permit toddy to be drawn therefrom in the manner and to the extent provided by the provisions of this Act [or. any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder."

14. It is obvious that the power to issue Notification has been delegated to the State Government in view of Section 11 of the Bombay Prohibition Act. Under Section 139 power is vested in the State Government to issue Notification. The present Notification has been issued by exercising the said power vested in it under Section 139. The Government has amended its policy from time to time. First time, it was done in the year 2001, thereafter in the year 2008 and on 29th October 2016. In our view, the said Notification dated 28th October 2016 has been issued keeping in mind public interest i.e. health of the people at large drinking toddy and therefore it cannot be said to be arbitrary. The State Government has a power to impose conditions, keeping in mind the object which is sought to be achieved, namely public interest by providing pure and unadulterated toddy to the people at large.

15. The sale of the toddy is not a fundamental right and it is subject to reasonable restrictions as laid down in Article 19(g) of the Constitution of India. The Apex Court in the matter of Kerala Bar Hotels Association Vs. State of Kerala [(2015) 16 SCC 421 has accepted the decision in the matter of Khoday Distilleries Ltd Vs. State of Karnataka [(1995) 1 SCC 574.. The Apex Court in the said Judgment has observed in paragraphs 30, 32 and 33 as under:- "30. The next ground for challenge has been under Article 19. Learned Senior Counsel for the Appellants, Mr. Aryaman Sundaram, has sought to argue that a right under Article 19(1)(g) exists in the business of liquor. In his detailed elucidation of the decision in Khoday, he has contended that the State is given three options. The first is prohibition, the second is a State monopoly in manufacture or trade or both in potable liquor, and the third, which is similar to the case at hand, is that the State allows private individuals into this business, in which event everyone would have a right to partake in it. Reliance was placed on the following paragraphs of Khoday:

"55. The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also enjoined from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and

consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6) of the Constitution.

56. The contention further that till prohibition is introduced, a citizen has a fundamental right to carry on trade or business in potable liquor has also no merit. All that the citizen can claim in such a situation is an equal right to carry on trade or business in potable liquor as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business. When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licenses to carry on such business. But the said equal right cannot be elevated to the status of a fundamental right".

32. We disagree with the submissions of the Respondents that there is no right to trade in liquor because it is *res extra commercium*. The interpretation of Khoday put forward by Mr. Sundaram is, in our opinion, more acceptable. A right under Article 19(1)(g) to trade in liquor does exist provided the State permits any person to undertake this business. It is further qualified by Article 19(6) and Article 47. The question, then, is whether the restrictions imposed on the Appellants are reasonable.

33. We have had the privilege and indeed the pleasure hearing the extremely erudite arguments of a galaxy of senior counsel on both propositions on the interpretation of our constitution and the laws pertaining to the right to carry on trade or business in potable liquor by this Court. In Krishan Kumar Narula, the Constitution Bench was of the opinion that dealing in liquor is a legitimate business, although the State can impose reasonable restrictions. A few years later, however, in Khoday, the concept of *res extra commercium* came to be accepted and applied to the business of manufacture and trade in potable liquor. This Court, however, did not place any embargo or constraints on the State to transact this business. History has painstakingly made it abundantly clear that prohibition has not succeeded. Therefore strict state regulation is imperative. The State of Kerala had in the past forayed into prohibition, but found it to be unimplementable. Thereafter, keeping in mind the heavy consumption of alcohol within the territory, it has experimented with other measures to user temperance if not abstemiousness. So far as this trade is concerned, Article 47 of the Constitution places a responsibility on every State Government to at least contain if not curtail consumption of alcohol. The impugned Policy, therefore, is to be encouraged and is certainly not to be struck down or discouraged by the Courts. How this policy is to be implemented, modified, adapted or restructured is the province of the State Government and not of the Judiciary. The

consumption of tobacco as well as liquor is now undeniably deleterious to the health of humankind. Advertising either of these intoxicants has been banned in most parts of the world, the avowed purpose being to insulate persons who may not have partaken of this habit from being seduced to start. Banning public consumption of either of these inebriants cannot be constrained as not being connected in any manner with the effort to control consumption of tobacco, or as we are presently concerned, with alcohol. Vulnerable persons, either because of age or proclivity towards intoxication or as a feature of peer pressure, more often than not, succumb to this temptation. Banning public consumption of alcohol, therefore, in our considered opinion, cannot but be seen as a positive step towards bringing down the consumption of alcohol, or as preparatory to prohibition". The contention of the petitioners that they have right to carry on business under Article 19(1)(g) therefore cannot be accepted.

16. In our view, the Judgment in the matter of State of Kerala & Ors. Vs. Unni and Anr(supra) also is of no assistance to the petitioners, as the issue raised in the said petition was different and therefore ratio of the said judgment is not applicable to the facts of the present case. In the said case, one of the issues was, where two interpretations are possible having regard to the workability or unworkability of the statute; one which leads to workability of the statute must be preferred to the other. There cannot be any two opinions regarding the proposition laid down by the Apex Court in the aforesaid case. However, in our view, the said proposition is not of any assistance to the petitioners in the facts of the present case.

17. Mr. Thorat, the learned Counsel for the petitioners submitted that the rules cannot be altered by the Government Resolution. In our view, there is no substance in the said submission since under Section 11 read with Section 139 of the Bombay Prohibition Act, powers are delegated to State Government to frame rules.

18. For the aforesaid reasons, it is not possible to accept the contentions of the petitioners. The aforesaid Writ Petitions are dismissed.