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**(2013) 12 BOM CK 0196**

**In the Bombay High Court**

**Case No :** Civil Appellate Jurisdiction. Writ Petition No. 9680 of 2011

Shaikh Salimoddin Shaikh Shamsoddin,

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision :** 20-12-2013

**Acts Referred:**

**Citation :** (2014) MCR 524

**Hon'ble Judges :** S.S. Shinde, J.

**Bench :** Single Bench

**Advocate :** Mr. R.T. Nagargoje, Advocate, for the Petitioner; Mr. Pravin Dighe, Advocate, for the Respondent No. 6; Mr. G.K. Thigle-Naik, A.G.P, for the State of Maharashtra

**Final Decision :** Disposed Off

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## **Judgement**

S.S. Shinde, J.—Rule. Rule made returnable forthwith. Heard with the consent of the parties.

2 .This Writ Petition is filed challenging the order dated 18th August, 2004 passed by respondent No.2 - the Hon'ble Minister, Food, Civil Supply and Consumer Protection Department, Mantralaya, Mumbai in Revision Application No. oSve&1604@1168@iz0dz0 837@uk0iq0@21 thereby, directing the authorities to restore the licenses of Fair Price Shop Nos. 73, 77 and 78 ( In Short, FPS Nos. 73, 77 & 78.) in favour of Respondent No.6 Society.

3. It is case of the Petitioner that, Resp.No.6 - Society was allotted FPS Nos. 73, 77 & 78 but, subsequently because of economical difficulties and mis-management, Resp.No.6 - Society was unable to run the same. Accordingly, Resp.No.6 - Society had passed a Resolution and decided not to run the Society and also agreed to grant licenses in favour of its Salesmen. The Petitioner was one of the Salesman of Shop No.77 of Resp.No.6 - Society. As such, FPS No.77 was allotted to the Petitioner. Respondent No.6 had submitted an application before the learned District Collector, Aurangabad and requested to allot FPS

No.77 in favour of the Petitioner. On 21st September, 1984, Resp.No.4 by his order cancelled the licence of Resp.No.6 - Society and issued allotment letter in favour of the Petitioner.

4. It is case of the Petitioner that, after a period of 20 years, i.e. on 29th September, 2003, Resp.No.6 - Society submitted an application before the District Supply Officer and requested to re-grant licence of FPS Nos. 73, 77 and 78 in its favour. On 7th November, 2003, said authority has refused to consider the said request. On 19th January, 2004, Resp.No.6 - Society filed Revision before the Dy.Commissioner (Supply) Aurangabad without joining / impleading the present Petitioner as a party - respondent. It is case of the Petitioner that, by way of temporary arrangement, the concerned authority granted FPS No.77 in favour of Resp.No.6 - Society. Being aggrieved by the said order, the Petitioner had instituted Regular Civil Suit No.238 Of 2004 in the Civil Court, Senior Division, Aurangabad for perpetual injunction restraining Respondent No.6 Society from dispossessing him from FPS No.77 and inter alia, filed an application Exh.No.5 for grant of temporary injunction. The learned Civil Judge, Senior Division, Aurangabad by his order dated 4th February, 2005 temporarily restrained respondent No.6 Society from dispossessing the Petitioner from FPS No.77. However, in CRA No.10/2006 an objection was raised in respect of maintainability of said Civil Suit. It is further case of the Petitioner that, the learned Civil Judge, Senior Division, Aurangabad dismissed Regular Civil Suit No.238/05 instituted by Petitioner. Thereafter, being aggrieved and dis-satisfied by said order, the petitioner preferred Regular Civil Appeal No.102 Of 2011 in the District Court, Aurangabad. Subsequently, on 21st November, 2011 he filed withdrawal pursis and withdrew the said Regular Civil Appeal.

5. It is further case of the Petitioner that, for FPS No.77 there are two licences i.e. one for Fair Price Shop and another is a kerosene licence. It is case of the Petitioner that, licence for kerosene was cancelled without joining the Petitioner as party respondent. Therefore, being aggrieved with order dated 22/08/05, passed by respondent No.2, Petitioner filed W.P.No. 6705/05 in this Court wherein interim order was passed by the Division Bench of this Court on 7th July, 2006 and order passed by respondent No.2 dated 22nd August, 2005 was stayed. It is further case of the Petitioner that, though he is running said FPS upto the year 2011 regularly, sincerely and without any complaint but, in the month of June, 2011 without following due procedure, the licence of the Petitioner was cancelled by the Dist. Supply Officer.

6. The learned counsel for the Petitioner submits that, though the Petitioner is directly affected party, in as much, the Petitioner was running FPS No.77, Resp.No.6 - Society herein initiated proceeding for FPS Nos.73, 77 and 78 without impleading the present Petitioner as party to the said proceedings. It is submitted that, Dist.Supply Officer rejected the prayer of Resp.No.6 - Society to re-grant licence to run FPS Nos. 73, 77 and 78. It is further submitted that, Resp.No.6 - Society aggrieved by the order passed by Dist.Supply Officer, filed

proceedings before the Dy.Commissioner (Supply) without joining the Petitioner as a party respondent, when the Petitioner was legally holding licence to run FPS No.77. It is submitted that, the proceeding before the Dy.Commissioner(Supply) was not maintainable because non joinder of necessary parties. It is submitted that, irrespective of impleading the present Petitioner as a party to said proceedings, the Revisional Authority allowed prayer of respondent No.6 after 20 years for cancellation of licence and granted the same in favour of the Resp.No.6 - Society. It is submitted that said authority has not considered the fact that, licence has already granted in favour of the Petitioner as per the order passed by the learned District Collector, Aurangabad in the year 1982 and till this time/ date, said order is not challenged by respondent No.6. It is submitted that, Civil Court in-juncted Resp.No.6 - Society and respondent authorities from interfering in the running of FPS by the Petitioner however, in view of the fact the Civil Court has no jurisdiction to entertain the suit, on 21st November, 2011 the Petitioner himself has withdrawn the Regular Civil Appeal No.102 Of 2011 preferred by him.

7. It is submitted that, the Petitioner is uneducated and was unaware about the procedure/remedies to be availed, instituted Regular Civil Suit in the Civil Court, Sr.Divn., Aurangabad. It is submitted that, order passed by Dy.Commissioner (Supply) was without joining the Petitioner as a party respondent and, therefore, said order is nullity and non est It is submitted that, even the order passed by the Hon"ble Minister, Food, Civil Supply and Consumer Protection Department, Mantralaya,Mumbai in Revision Application No.1604/1168/Pra-Kra-837/21 dated 18th August, 2004 is without joining the present Petitioner as a party respondent and, therefore, such order, which is passed without joining the Petitioner, which directly affected the party, deserves to be set aside. It is submitted that, when the order passed by the respondents Authorities is without hearing the Petitioner, though he thereby affected directly, goes to the root of the matter and, therefore, question of delay in filing the Petition would not arise.

8. The learned counsel for the Petitioner pressed into service exposition of this court in case of Peoples" Education Society, Jat & Ors., v. Manohar Shivappa Modi (Dr.) & Ors., reported in 2009(2) Maha. L.J., 745 and submits that, order obtained by Resp.No.6 - Society is by playing fraud, in as much as, since the Petitioner is directly affected party, he would have jointed as respondent in the proceedings either before the Dy. Commissioner (Supply) or before the Hon"ble Minister. Therefore, such order is a nullity and non-est in the eyes of laws. The learned counsel further invited my attention to the reported judgment of Hon"ble Apex Court in case of A.V. Papayya Sastry & Ors., v. Government of A.P. & Ors., reported in 2007 AIR SCW 2212 and in particular Head Note "C" thereof. He submits that, every order obtained by exercising fraud, can be recalled, since such order is non existent and non est and cannot be allowed to stand. He further invited my attention to the observation made in a case of A-One Cement Concrete Works v. Regional Provident Fund Commissioner, Pune, reported in 1998(3) ALL MR 193 and submits that, order passed without hearing the party affected, principle of nature justice violated and said order liable to be set aside.

He further relied on the judgment of this court dated 18th August, 2009 in case of Girja Maschya Vyavsaik Sahakari Sanstha Maryadit, Phulambri v. The State of Maha.& Ors., ( W.P. No.5169/2009) and submits that, order which is passed without hearing the affected party, cannot be sustained. Therefore, relying upon the pleadings in the petition, grounds taken therein, annexure thereto, the learned counsel for the Petitioner prays that, Petition may be allowed in terms of prayer clause/s (a), (c), (d), (e) and (f).

9. On the other hand, learned counsel for Resp.No.6 - Society submits that, Writ Petition filed by present Petitioner challenging the order passed by the learned Dy. Commissioner (Supply) dated 19th January, 2004 and order passed by the Hon''ble Minister dated 18th August, 2004 is hopelessly time barred, therefore, on the ground of laches, Petition deserves to be dismissed with costs. In support of his contention, he pressed into service exposition of Hon''ble Apex Court in case of Virendra Chaudhary v. Bharat Petroleum Corpn. & Ors., reported in (2009) 1 S.C.C. 297 and in particular paragraph No.15 thereof and another reported case in case of Santoshkumar Shivgond Patil v. Balasaheb Tukaram Shevale & Ors., reported in (2009) 9 S.C.C. 352.

10. The learned counsel for Resp.No.6 - Society submits that, Resp.No.6 is a Magas Vargiya Grahak Sahakari Sanstha registered under the provisions of the Maha.Co-Operative Societies Act,1960 and was running three FPS Nos. 73, 77 and 78 in Aurangabad District at different places. In the year 1982, Resp.No.6 Society went into liquidation and Administrator was appointed. Therefore, FPS No.s.73, 77 & 78 were given for running to the Salesman of the said Sanstha and FPS No.77 was given to Petitioner, who was also one of the Salesman of said Sanstha. Since the year 1982, Resp.No.6 Sanstha is in liquidation. Thereafter, the Petitioner in collusion with the then Chairman of said Sanstha prepared false record to show that, Resolution is passed on 11th April, 1984 thereby, FPS No.77 was allotted by the said Society in his favour. The District Deputy Register, Co-Operative Societies, Aurangabad by his order dated 1st September, 2003 withdrew the liquidation and handed over the affairs of said Society to its Managing Committee. Thereafter, on 29th September, 2003, Resp.No.6 Sanstha filed an application before the Additional Collector, Aurangabad to restore the FPS No.s.73, 77 & 78 to it however, respondent No.5 by his order dated 7th November, 2011 rejected the said application. Being aggrieved by the said order, Resp.No.6 filed Revision Application before Respondent No.3, who by his order dated 19th January, 2004 directed respondent No.5 to take steps for restoring said shops to Resp.No.6 Society. In the meantime, the Petitioner instituted Regular Civil Suit No.238 Of 2004 in the Civil Court, Senior Division, Aurangabad for perpetual injunction restraining Resp.No.6 Society from dispossessing him from FPS No.77 and inter alia, filed an application Exh.No.5 for grant of temporary injunction.

11. It is further case of Resp.No.6 that, respondent No.2 i.e. the Hon''ble Minister, Food, Civil Supply and Consumer Protection Department, Mantralaya,

Mumbai by his order dated 18th August, 2004 allowed Revision Application No.1604/1168/Pra-Kra-837/21 and directed the authorities to restore the licenses of FPS No.s.73, 77 & 78 in favour of Resp.No.6 Society. It is further case of Resp.No.6 that, the learned Civil Judge, Senior Division, Aurangabad by his order dated 4th February, 2005 temporarily restrained Resp.No.6 Society from dispossessing Petitioner from FPS No.77. It is further case of Resp.No.6, though respondent No.2 passed an order directing restoration of said shops with Resp.No.6 Society, still kerosene quota was not released, therefore, Resp.No.6 Society filed an application before respondent No.5 however, Dist.Supply Officer / Resp.No.5 rejected said application on 9th June, 2005. Being aggrieved by the said order, Resp.No.6 Society filed Revision Petition before respondent No.2. Thereafter, respondent No.2 allowed said Revision Petition on 22nd August, 2005 and directed to attach the kerosene licence in favour of Resp.No.6 Society and further to release kerosene quota accordingly. Being aggrieved by the order dated 22nd August, 2005, passed by respondent No.2, the Petitioner filed Writ Petition No.6705 Of 2005 in this Court on 19th September, 2005. This Court admitted said Writ Petition and on 7th July, 2006 passed interim order and, thereby, stayed the order dated 22nd August, 2005 passed by respondent No.2. It is further case of Resp.No.6 that, the learned Civil Judge, Senior Division, Aurangabad dismissed Regular Civil Suit No.238/05 instituted by Petitioner. On 14th February, 2011, Resp.No.6 Society filed an application with Respondent No.5 requesting him to allot the quota of food grains as Civil Suit filed by Petitioner came to be dismissed. Thereafter, being aggrieved and dis-satisfied by the order passed by learned C.J.S.D., Aurangabad, Petitioner preferred Regular Civil Appeal No.102 Of 2011 in the District Court, Aurangabad. Subsequently, on 21st November, 2011 the Petitioner filed withdrawal pursis and withdrew said Regular Civil Appeal. It is further case of Resp.No.6 that, the Central Vigilance Committee carried out the inspection of FPS No.77 run by the Petitioner during the period from 28th December, 2010 to 5th January, 2011 and submitted its detailed report showing various illegalities, irregularities, discrepancies and malpractices on the part of the Petitioner. Acting upon the said report, respondent No.5 issued notice to the Petitioner on 2nd June, 2011 and called his explanation in respect of illegalities and malpractice shown in the report submitted by the C.V.C. On 15th June, 2011. The Petitioner submitted his reply to the notice issued by respondent No.5 upon which, respondent No.5 by his order dated 16th June, 2011 cancelled the licence of FPS No.77. Thereafter, on 11th July, 2011 Resp.No.6 Society made an application to respondent No.5 to resume supply of food grains in favour of the Society. It is specific case of Resp.No.6 Society that, that time, it was not aware about the order passed by Dist. Supply Officer cancelling the licence of Resp.No.6 Society. On 28th July, 2011 Resp.No.6 Society got the knowledge of order dated 16th June, 2011 passed by the Dist.Supply Officer. Therefore, it filed Revision No.308 Of 2011 before respondent No.3. The Petitioner also filed Revision No.317 Of 2011 on 3rd August, 2011. Respondent No.3 by his order dated 17th April, 2012 allowed Revision No.308 Of 2011 filed by Resp.No.6 Society and dismissed Revision

No.317 Of 2011 filed by the Petitioner and specifically directed to restore the licence of FPS No.77 in favour of Resp.No.6 Society. Thereafter Resp.No.6 Society made an application to respondent No.5 to take necessary steps in view of the order passed by respondent No.3 for restoring the FPS No.77 in its favour. Thereafter, challenging the orders passed by respondent Nos. 3 and 5, the Petitioner filed Revision before Respondent No.2 on dated 26th April, 2012. On 30th April, 2012 Resp.No.5 / Dist.Supply Officer issued a letter to Food Grains Distribution Officer, Aurangabad to comply with the order passed by Resp No.3. Further, he wrote a letter to F.G.D. Officer on 14th May, 2012 and asked to accept the deposits and renewal fees from Resp.No.6 Society and resume the supply of food grains and kerosene. On 14th May, 2012, Resp.No.6 Society has deposited the renewal fees vide challan. Respondent No.5 on 29th May, 2012 issued authorisation letter in favour of Resp.No.6 Society for FPS No.77. It is further case of Resp.No.6 that, thereafter in the month of June, 2012, Resp.No.6 Society has lifted the quota of food grains and started its distribution to the Card Holders. Upon getting the knowledge of Revision filed by Petitioner on 29th January, 2013, Resp.No.6 Society obtained the copies of order and thereafter filed Writ Petition No.1080 Of 2013 in this Court challenging the order dated 23rd January, 2013 passed by respondent No.2. It is case of Resp.No.6 Society that, this court vide its order dated 6th February, 2013 passed an interim order directing not to take any action against Resp.No.6 and same is in force till today. This court on 16th April, 2013 disposed of Writ Petition No.1080/2013 thereby, setting aside the order passed by respondent No.2 and restored the Revision to its original stage with specific direction to hear both the Revision/s within a period of eight weeks. On 12th June, 2013, respondent No.2 partly allowed the Revision bearing No. osSve&1012@iz-dz-236@uk-iq-@21 and, thereby, set aside the order dated 17th April, 2012 passed by Respondent No.3 and order dated 16th June, 2011 passed by respondent No.5 and directed that, Fair Price Shop licence be restored with the Petitioner and by the same order imposed fine of Rs.10,000/- only upon Petitioner. Being aggrieved and dissatisfied by the said order, Resp.No.6 Society has filed Writ Petition No.4940/2013.

12. I have given careful consideration to the submissions advanced by learned counsel for the parties, at length. With their able assistance perused the grounds taken in the petition, annexures thereto, provisions of Essential Commodities Act, Maha.Scheduled Commodities (Regulation & Distribution) Order, 1975, judgments cited by learned counsel for the parties and also reasons recorded by respondent Nos. 2,3 and 5 while passing the impugned orders.

13. In the peculiar facts and circumstances of present case, petition cannot be rejected on the grounds of delay / laches for the simple reason that the proceedings initiated by Resp.No.6 - Society either before the Dy. Commissioner (Supply) or before the Hon"ble Minister was without joining the present Petitioner as a party respondent. In fact, the Petitioner is directly affected party, in as much as, the Petitioner was running the FPS No.77, therefore, it was incumbent upon Resp.No.6 - Society to joint / implead the Petitioner as party

respondent in all these proceedings. Therefore, the learned counsel appearing for the Petitioner is right in relying on the judgment of Hon"ble Apex Court in case of A.V. Papayya Sastry (cited supra), in which view is taken that if the order is obtained by fraud, in that case, said order can be recalled. Further this court in a case of Peoples Education Society, Jat, (cited supra), has taken a view that, a judgment, order or decree obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eyes of law.

14. In the facts of present case, it is admitted position that in absence of challenge to the order passed by the learned District Collector passed in the year 1984 thereby granting licence in favour of the Petitioner to run FPS, Resp.No.6 - Society cannot get the licence to run FPS No.77. Admittedly, the Petitioner was not impleaded as a party to the proceedings either before the Dy.Commissioner (Supply) or the Hon"ble Minister. Therefore, such order was nullity and non est in the eyes of law. Therefore, such orders passed by the revisional authorities would not be binding on the Petitioner. Since the Petitioner was not impleaded as a party to these proceedings, there is clear cut violation of principles of nature justice and the order passed by the revisional authorities cannot be sustained in the eyes of laws. Therefore, this Court is of considered opinion that, said orders deserves to be quashed and set aside. Accordingly, the Petition succeeds. Petition is allowed in terms of prayer clause/s (d) and (f). As a result, following order is passed :-

#### ORDER

(i) Order passed by learned Deputy Commissioner (Supply) Aurangabad in case of izdj.k dz0 2002@,lch@fj0ih0& 357 dated 19th January, 2004 is quashed and set aside.

(ii) Judgment and Order passed by respondent No.2

- the Hon"ble Minister, Food, Civil Supply and Consumer Protection Department, Mantralaya, Mumbai in case of < oSve&1604@1168@iz0dz0 837@uk0iq0@21 dated 18th August, 2004 is quashed and set aside.

(iii) It is made clear that, final prayer clause (e) in the Petition i.e. "by issuing appropriate writ, order or directions in the like nature, the Petitioner may be permitted to run the Fair Price Shop No.77, as per the order dated 21/09/1984 passed by the Collector, Aurangabad" stands rejected in view of the reasons recorded while disposing the Writ Petition No.4940 Of 2013 (Nandabodhi Magas Vargiya Grahak Sahakari Sanstha Maryadit, Aurangabad Through Its Chairman Shaikh Rashid Shaikh Mehboob v. The State of Maharashtra Through Its Principal Secretary, Food, Civil Supply and Consumer Protection Department, Mantralaya, Mumbai.)

(iv). It is for the District Supply Officer, Aurangabad to follow due procedure of law and invite applications from eligible persons / N.G.O. to run said Fair Price Shop and allot the same to eligible person, who would look after the interest of

all card holders including the beneficiaries under the Central / State government Schemes and work strictly within the four corners of law.

(v). Writ Petition is disposed in above terms.