

(1997) 05 BOM CK 0004
In the Bombay High Court
Case No : Writ Petition No. 291 of 1994

Uttam Jaiswal

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 06-05-1997

Acts Referred:

Bombay Prohibition Act, 1949 — Section 11, 137, 143, 52, 53
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15
Constitution of India, 1950 — Article 14, 15, 19(1), 324
Essential Commodities Act, 1955 — Section 3
Evidence Act, 1872 — Section 115
Maharashtra Country Liquor Rules, 1973 — Rule 24, 28, 43
Partnership Act, 1932 — Section 41, 42, 43, 44
Telegraph Rules, 1951 — Rule 422

Citation : (1998) 1 BomCR 437 : (1998) 1 MhLj 333

Hon'ble Judges : R.G. Deshpande, J

Bench : Single Bench

Advocate : R.N. Dhorde, for the Appellant; D.A. Gursahani, P.G.
Godhamgaonkar, A.G.P., for the Respondent

Judgement

R.G. Deshpande, J.—In the present petition, the petitioner is challenging the order dated 22nd July, 1993 passed by the Secretary, Home Department, Government of Maharashtra (respondent No. 1), arising out of the order dated 14th May, 1992, passed by the Commissioner, State Excise, Maharashtra State, Bombay, in Appeal No. 55/1992 which, in its turn, arose out of the order dated 31st March, 1992, passed by the Collector, Aurangabad in Case No. 851/90.

2. The facts of the present case, in brief, are :

That the present petitioner - Uttam holds a licence of retail business in country liquor under Form No. C.L. III since 26th April, 1974, which was renewed from time to time. Petitioner -Uttam continued the said business till 1978 in the same style and capacity under the name and title "Madira Sagar".

3. In the year 1978 and, to be precise, on 21st November, 1978, the petitioner

entered into an agreement with the respondent No. 2 - Pradeep for doing the business in partnership. This deed of partnership is dated 21st November, 1978, a copy of which is on the record of this petition at Annexure "B". Amongst other clauses of the partnership, there was a clause to the effect that the partnership was at will. It was vide Clause 6. Amongst other clauses, another relevant Clause was 15, as it originally stood, provided that upon the inclusion of the name of the respondent No. 2 - Pradeep in the licence i.e. C.L. III, the party No. 1 of the said agreement i.e. present petitioner - Uttam to retire from the partnership and in case the respondent No. 2 was desirous of petitioner's continuation in the partnership, the petitioner might continue in the same. It is also clear from the contents of the partnership deed that the petitioner had agreed to continue and remain in partnership so long as and till the excise licence stood in his name and the name of the party No. 2 - Pradeep was not incorporated in the licence. It would be relevant at this stage to refer to Clause 16, which is as under :

"The party No. 1 has agreed that upon his retirement from the partnership, the party No. 2 may continue the business under the name and style "M/s Madira Sagar", at the same terms and without any objection and dispute."

4. It was the contention of the respondent No. 2 that right from the beginning, the business in question belonged to him i.e. the respondent No. 2 and that the excise license was obtained in the name of the petitioner i.e. Uttam, only for some other purposes. In fact, for the purposes of the present petition, that question need not be gone into nor could that question be adjudicated in the present writ petition.

5. As observed above, in pursuance of the partnership deed, the partnership came to be registered with the Registrar of Firms on 3rd February, 1979 at Sr. No. 40/79. On 1st September, 1979, the petitioner applied to the Collector for inclusion of the name of the respondent No. 2 - Pradeep in the excise licence which, however, came to be rejected by the Collector on 6th February, 1982. In those proceedings of inclusion of name, the respondent No. 2 did file an affidavit dated 23rd March, 1981, wherein the respondent No. 2 stated that if the Government or any authority did not agree to the partnership, the respondent No. 2 would get himself deleted from the partnership and would be held responsible for the consequences thereof. No doubt, the usual undertaking as regards abiding by the rules and regulations of the Prohibition Act, orders and conditions of the license was also given by said Pradeep - the respondent No. 2.

6. After rejection by the Collector by order dated 6th February, 1982, the petitioner filed an appeal before the Commissioner of State Excise, Maharashtra State, Bombay, challenging the order of the Collector. It appears that during the pendency of the appeal before the Commissioner of State Excise, the said authority sought certain guidance from the State Government as regards inclusion of the partners in the business which is carried on the basis of licence in that respect. In response to that, on 8th March, 1985, the Government of Maharashtra in Home Department vide letter bearing No. L.L.R./2482/853/PRO/

dated 3rd/8th March, 1985 informed that the Government had no objection for inclusion of the name of respondent No. 2 on the condition that the original licensee would remain major beneficiary and the incoming partner would not have any claim to the licence in the event of death or retirement of original licensee. Thus, the learned Commissioner, State Excise, in pursuance of the direction given by the Government, vide its letter dated 8th March, 1985 allowed the appeal of the petitioner by order dated 12th March, 1985 and permitted the Collector to allow the name of the respondent No. 2 for being included in the licence. The Collector, State Excise, in his turn, got the undertaking from the respondent No. 2 on oath and necessary application from the respondent No. 2 for inclusion of his name in the licence, subject to the aforesaid conditions. The respondent No. 2 solemnly declared that he would not have any right to the licence in the event of death or retirement of the original licensee. Identical application was also made by the petitioner - Uttam on 14th March, 1985. On completion of above said formalities, the partnership was continued on those terms till March 1988 smoothly.

7. It appears that till the abovesaid period, there appeared to be no dispute whatsoever between the petitioner and the respondent No. 2 in any respect. However, it appears, thereafter, some difference occurred amongst them which ultimately resulted in driving them in opposite directions. From the record, it is clear that by a notice dated 24th March, 1988 (which is at Exh. "K" at page 75 of the paper book) the petitioner demanded accounts of the partnership from the respondent No. 2. Under subsequent notice dated 28th March, 1988, sent through his advocate, the petitioner dissolved the partnership firm, alleging that it was a partnership at will which could be dissolved by such notice. In this notice, it is specifically written in para 4 that, "you are hereby informed that the partnership between you and my client, stands dissolved from today i.e. 28th day of March, 1988." The other contents of this notice of dissolution which are relevant for the purposes of this petition are that it was informed to the respondent No. 2 that the petitioner was to be a major beneficiary and that the respondent No. 2 had no right or claim over the said licence in the event of retirement of original licensee or the dissolution of the partnership. The petitioner, therefore, by this notice informed the respondent No. 2 that the licence since originally was granted in his name, would continue to be in his name and he alone would be the holder of the said licence. By the said notice, the petitioner also sought for rendition of accounts, within a week's time of the receipt of that notice by the respondent No. 2.

8. It appears that this notice of dissolution of partnership was avoided to be received by the respondent No. 2. However, according to the petitioner, a notice which was sent by ordinary post was received by the respondent No. 2. However, in spite of that the respondent No. 2, according to the petitioner, failed to submit the accounts of the business. However, in the mean time, the licence was renewed in the name of partnership upto 31st March, 1990, and in the mean time, the petitioner had already applied to the authority concerned that the

licence should not be renewed under single signature of the respondent No. 2 and also that the power of authority which was executed in favour of the respondent No. 2 was also revoked and that the partnership was dissolved.

9. Because of the above said stand of the petitioner, the Collector did not issue challan towards the licence fee and did not accept the application form for renewal which was submitted by the respondent No. 2. The respondent No. 2, therefore, filed writ petition in this Court some time in the month of March, 1989, itself and sought a direction against the Collector to accept the licence fees and application and to renew the licence. This writ petition was registered as Writ Petition No. 851/90. In pursuance of the order in that petition, it appears that the Collector, State Excise allowed renewal of the licence by order dated 31st March, 1990 for the period from 1st April, 1990 to 31st March, 1991. However, for certain reasons, the Collector, because of certain problems in the year 1991, refused to accept the respondent No. 2's application for renewal of licence as also for acceptance of the fees. This prompted the respondent No. 2 to file writ petition being Writ Petition No. 1127/91 before this Court which came to be dismissed by order dated 27th March, 1991 by this Court. Review petition against that, at the instance of the respondent No. 2 being Review Petition No. 1531/ 1991 appear to have been admitted by order dated 22nd April, 1991.

10. The petitioner made several applications requesting the authority concerned to delete the name of the respondent No. 2 from the licence. One of such application is dated 12th July, 1991. The Collector, State Excise, fixed the matter for hearing thereon, however, was required to adjourn the same on many occasions at the instance of the respondent No. 2. Since the matter could not be disposed of earlier, the petitioner was required to move this Court by Writ Petition No. 352/92.

11. This Court, as is clear from the record, by order dated 31st March, 1992 directed the Collector, Aurangabad to decide the said application immediately and, accordingly, the Collector, Aurangabad decided the same on 21st March, 1992 ordering that the name of the respondent No. 2 - Pradeep be deleted from the licence. From the record, it is also clear that there was also a dispute between the parties as regards foreign liquor license and in that also, necessary order was required to be passed by this Court in Writ Petition No. 353/92. It would not be out of place to mention here at this stage that second petition as regards the foreign liquor license is also heard along with this petition and is being dealt with simultaneously but separately i.e. Writ Petition No. 2643/92.

12. In pursuance of the order of the Collector, this deletion took place or rather was effective from 1st April, 1992, and the license was renewed in the single name of the petitioner for the period from 1st April, 1992 to 31st March, 1993.

13. The respondent No. 2 dissatisfied with the order dated 31st March, 1992, preferred an Appeal No. 55/92 before the Commissioner, State Excise, M.S., Bombay, which was heard on 13th April, 1992 and by order dated 14th May,

1992 the same was dismissed by the Commissioner, State Excise, M.S., Bombay.

14. Being aggrieved by the abovesaid order dated 14th May, 1992, the respondent No. 2 - Pradeep preferred a revision u/s 137 of the Bombay Prohibition Act, 1949 which is numbered as C.L.R.-1292/1373/Exh. III. The said revision is decided by the Secretary to the Government, Home Department, and by his order dated 22nd July, 1993, the Secretary allowed the revision application, setting aside the orders passed by both the excise authorities below. It is this order which is under challenge in the present petition.

15. Before considering the challenges raised by the petitioner and its rebuttal by the respondent No. 2 and further to appreciate the arguments of both the sides, it would be necessary for me, in short, to refer to the findings of the authorities below.

16. The Collector, who dealt with the matter, specifically observed that the original licence was in the name of the petitioner which was granted in the year 1974 and, for the first time, the name of the respondent No. 2 was entered in the same, in the year 1979, that too on certain conditions which are incorporated by the Commissioner of Excise. The main beneficiary in this license was, no doubt, the present petitioner. The Collector, rightly considered that the question which was to be decided by him was as to whether the name of the non-applicant No. 2 could be deleted from the licence. According to the petitioner, the name of the non-applicant No. 2 automatically stood deleted from the license on the date when the notice of dissolution of partnership was served. However, since the non-applicant No. 2 approached this Court in Writ Petition No. 851/90 and in view of the interim orders therein, the license was renewed in the name of both. He has also rightly referred to Writ Petition No. 1127/91, which was filed at the instance of the present petitioner and which came to be decided on 30th March, 1991, whereby the Collector was directed to examine rights and equities of the parties and to consider the question as to whether the name of the non-applicant No. 2 could be deleted. However, the authorities were directed in the mean time to accept the challan of requisite fees in the Treasury for renewal of Licence No. 133 and to grant provisional licence or renew licence so as to allow the parties to continue the business pending decision of the petition. It is because of these reasons the licence was renewed for the year 1991-92. Again on 3rd March, 1992, this Court in Writ Petition No. 352/92 passed an order directing the Collector to dispose of petitioner's application dated 12th July, 1991. This is how the matter had been pending before the Collector and the same was finally decided by the Collector by his order dated 31st March, 1992. There does not appear to be any serious dispute as regards the fact that the business of partnership continued in the name of both the parties i.e. the present petitioner and the respondent No. 2 till 1988 and subsequently, as observed above, the licence was renewed for the years 1990-91 and 1991-92, because of the various orders in the proceedings. The learned Collector has rightly taken into consideration the fact that since the name of non-applicant No. 2 was inserted In

the licence in the year 1979 and since was allowed share in the business, the name of the respondent No. 2 could not be continued indefinitely, if looked at the matter in the background of conditions of the licence and the terms of the partnership. The learned Collector, therefore, observed that the partnership stood dissolved on notice and there was no right which could be said to have been created in the respondent No. 2 to get the licence continued in his name or to get his name in the licence continued. The learned Collector, therefore, reached to the conclusion that the name of the respondent No. 2 was liable to be deleted from C.L. III licence.

17. This view of the learned Collector is upheld by the Commissioner, State Excise, M.S., Bombay, by his order dated 14th May, 1992. Before the Commissioner, it was the contention on behalf of the respondent No. 2 that the conditions which were imposed by the Commissioner for admission of the respondent No. 2 as a partner were against the provisions of the Partnership Act. It was also contended before the Commissioner that the present petitioner had no knowledge and know-how of the business which was being run and that he also had no sufficient funds and even premises to run the country liquor shop. It was further argued by the respondent No. 2 before the Commissioner that previous approval of the Commissioner was necessary before ordering deletion of the name of the respondent No. 2 from the licence. According to him, no proper enquiry was conducted and hence he sought for setting aside the order of the Collector. The learned Commissioner reached to the conclusion, by his order dated 14th May, 1992 and, according to me rightly, that the partnership was at will which stood dissolved in view of the notice given by the present petitioner. As per the policy of the Government, the major beneficiary of C.L. III licence was to be the original licensee and the incoming partner had no any claim on the same. The learned Commissioner rightly negated the contention of the present respondent No. 2 that the conditions imposed by the Commissioner were not justified. In fact, those conditions which were imposed in the license and the necessary amendments which were directed to be made in the partnership deed were strictly in accordance with the policy of the Government and the same was accepted by the respondent No. 2 even without slightest murmur in that respect. Once having accepted the conditions, no doubt, the respondent No. 2 was estopped from contending that the conditions could not be said to be legal in any manner or that the same were not binding on him. The learned Commissioner also observed that there was no force in the contention of the respondent No. 2 that the Collector did not give the respondent No. 2 proper opportunity to defend himself. Thus, the learned Commissioner, State Excise, M.S., Bombay, upheld the order passed by the Collector, which was challenged at the instance of the respondent No. 2 before the Government by way of a revision.

18. The above said revision application was heard and decided by the Secretary, to the Government, Home Department, by his order dated 23rd July, 1993. The learned Secretary, however, on the basis of some irrelevant facts, observed that there should be no trade in licences and after having obtained a licence to sell

the country liquor, the licensee could not bring in and remove partners at will to suit his own convenience. In fact, these observations in the background of the present facts are absolutely irrelevant. Once having proceeded on the basis of valid licence granted in favour of the petitioner and further that after introduction of respondent No. 2 in the business and also insertion of his name in the licence on certain conditions, it was neither open for any of the parties to retreat therefrom nor was it open for the learned Secretary of the State to observe that the same was done as per the will of one particular party. If the partnership was at "will" then the question does not arise, if one of the partners wishes to dissolve the partnership firm and also acts in furtherance thereof by giving necessary notice. The moment the said notice is issued and the moment the notice is received by the other party, the partnership which is at "will", stands dissolved and for this proposition there need not be any counter opinion thereon as it is strictly in accordance with the provisions of sections 41 and 43 of the Indian Partnership Act. It appears that the learned Secretary - the respondent No. 1 has been swayed by some other irrelevant factors in the matter, such as, whether the petitioner had premises to run the business or that whether he had any knowledge to run the business, or that there was some other understanding between the parties, than the terms of partnership. In view of the legal position these aspects were totally irrelevant as the matter was supposed to be looked at from the stage of grant of licence initially in the name of the petitioner and, then, after introduction of respondent No. 2 in the business, in the name of two. Whether the petitioner had knowledge or not, whether the petitioner had finances or not, were not the questions to be gone into by the learned Secretary nor were those points for decision before him. The learned Secretary was only supposed to give his findings as to whether in view of the terms and conditions of the licence and in view of the terms and conditions of the partnership whether the name of the respondent No. 2 could be deleted or not from C.L. III licence.

19. One another aspect on which the learned Secretary to the Government of Maharashtra unnecessarily tried to deal with was as to whether the petitioner would be in a position to conduct the business particularly when there are strict conditions regarding the location on the assumption that the petitioner could not conduct the business as he had no location to conduct the same. It appears that the Secretary is unduly weighed by this aspect of the matter and relying on that submission of the respondent No. 2 before him, the learned Secretary unnecessarily tried to observe that, in fact, the respondent No. 2 was a de facto managing partner of this C.L. III vending licence which was originally issued in the year 1974 itself, in the name of the petitioner. Thus, the learned Secretary appeared to have far stretched the facts and without any legal basis, reached to the conclusion of reversing the orders passed by the authorities below.

20. Shri R.N. Dhorde, the learned Counsel appearing on behalf of the petitioner has assailed this order of the Secretary on various grounds, inter alia, contending that it was not open for the respondent No. 1 to go behind the conditions which were imposed in the partnership deed by way of amendment and also in the

license of C.L. III. Shri Dhorde, rightly pointed out that, in fact, by Exh. "C" page 61 of the paper book, which is an affidavit by the respondent No. 2, he had specifically undertaken to abide by the provisions of the Act, the rules and the regulations and also as per the conditions of licence and such other conditions that would be imposed by the Government or Excise authorities from time to time. At Exh. "D" page 63 of the paper book, the amendment to the partnership deed was made and which was unconditionally accepted by the respondent No. 2 and also Exh. "E" at page 65 of the paper book which is dated 4th June, 1981, wherein a new clause was introduced and accepted by both the parties which is as under :

"Partners further mutually agree that the partners shall mutually continue the business in partnership and that there is any intention that the party No. 1 shall retire from partnership on admission of party No. 2 in the partnership upon inclusion of the name of the party No. 1 in the excise licence. As such, it is hereby clarified that any such intention or meaning is derived from any clause or clauses of the said partnership stands deleted".

In view of this Shri Dhorde, contended that the question of retirement of the petitioner from the partnership did not arise. However, the clause as regards "partnership at will" remained unchanged and, therefore, the moment the notice of dissolution was served, the partnership stood dissolved. In view of the further conditions imposed by the licencing authority that the newly introduced partner i.e. present respondent No. 2, would not claim any right, title or interest in the licence if the original licensee retires from the partnership and, therefore, there was no question of respondent No. 2 to have any title, right or interest in the licence after deletion of his name with an additional fact that even as per the direction of the Government, the major beneficiary was to be the original licensee i.e. the petitioner. I do find substantial force in this argument and the same should not have been negated by the respondent No. 1.

21. Shri Dhorde further argued that in view of the above said document the respondent No. 2 was estopped from contending that the conditions were illegal and were beyond the authority of the respondent Nos. 3 and 4. Even at Exh. "H" page 70 of the paper books of this petition, the respondent No. 2 in unambiguous terms stated that. "I shall not have any claim to the license in the event of death or retirement of the original licensee". All these points if considered with proper perspective, would lead to an irresistible conclusion that the moment the petitioner withdraws from the partnership or the moment the partnership is dissolved, the respondent No. 2 does not have any claim on the license in any manner. On the point of estoppel, Shri Dhorde, rightly relied on the decision reported in G.T.N. Textiles Ltd. and another Vs. Assistant Directors, R.O.T. Commr. and others, . It is the case under the provisions of Essential Commodities Act. In this case, it is held that the conditions imposed by the authority having been accepted at the time of grant of licence and the authority having issued concerned notification u/s 3 of the said Act of 1955 read with

Textile Control Order 1986 Clause 16, well within his powers and competence could not be held to be violative of Article 19(1)(g) or Article 14 of the Constitution of India, more so when it was in the public interest. In the instant matter also, Shri Dhorde, rightly pointed out that the instructions issued by the Government could not be held to be violative of principles under the Constitution of India, particularly when the conditions which were imposed while granting the license were accepted by the parties.

22. Shri Dhorde also relied on the decision reported in *Kale and Others Vs. Deputy Director of Consolidation and Others*, , to show that the agreement between the parties was binding on them and I do find that Shri Dhorde was justified on relying on this case. However, the another case relied upon by Shri Dhorde reported in *Bhagwati Prasad Gupta Vs. Prakash Bhalotia*, , cannot be said to be straight way applicable in the present case.

23. Shri Dhorde, further, argued that the order dated 22nd July, 1993, passed by the respondent No. 1 is based on extraneous considerations. Shri Dhorde while using these words, "extraneous considerations", explained that thereby he wanted to suggest that the facts which were not necessary for decision, have been considered and, in fact, those facts could not have any bearing as regards the legal position in the matter. I have no hesitation in accepting this argument of Shri Dhorde, particularly when I have already observed that the learned Secretary, the respondent No. 1 instead of deciding the matter on the basis of legal provisions, tried to decide the matter on some facts, which were not of use and could not have been considered while deciding the point as regards the deletion of the name of respondent No. 2.

24. Shri Dhorde, the learned Counsel for the petitioner, further relied on the provisions of section 53 of the Bombay Prohibition Act, 1949 (hereinafter referred to as "the Act" for the purposes of brevity), pointing out that the said license was issued in the name of two as an undertaking was given by the parties to abide by all the conditions of license, permits, passes, or authorizations and the provisions of the Act. According to Shri Dhorde, all those terms and conditions which are incorporated while granting C.L. III licence are and were binding on both the parties. Section 139 of the Act deals with general powers of the State Government in respect of licenses, etc. Clause (g) of sub-section (1) of section 139 states that no license, 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 license, permit, pass or authorization can be granted. It is, thus, clear that the licence to be issued is to be with the approval of the Government or the State Government, as the case may be and further that the Government has every authority to make alterations or put any additional conditions or delete certain conditions while granting license. It is under these powers, certain conditions were put while granting permission to introduce the name of the respondent No.

2 in the present license in question. Hence the question that the Government or the Excise authorities had no powers to put any additional conditions did not arise and the argument based thereon by the respondent No. 2 really has no substance, more so when those conditions could not be said to be unreasonable or arbitrary.

25. Section 143 of the Act deals with the powers of the (State) Government to make rules. Rule 43 of the Maharashtra Country Liquor Rules, 1973 (which is hereinafter referred to as the "Rules" for the purposes of brevity) specifically makes it clear that, a retail licensee shall abide by the conditions of his license and the provisions of the Act and the Rules, the regulations and the orders made thereunder. A specific form of undertaking is given by way of Form C.L. XX. In the instant case, Shri Dhorde, pointed out that a necessary form to this effect under the Rules was filled in by the parties concerned and, now it is not open for any one of them to retract the same in any manner.

26. Shri Dhorde, further pointed out that the decision dated 2nd April, 1992, passed in Writ Petition No. 1618/94 could not be said to be applicable in the present case. With the help of the learned Counsel, I have gone through the said judgment and I do find considerable substance and force in the arguments of the learned Counsel in this respect.

27. Shri Dhorde, ultimately argued that while exercising revisional powers, the learned Secretary the respondent No. 1, transgressed the jurisdiction vested in him. According to Shri Dhorde, it was not Open for the respondent No. 1 and particularly while exercising his revisional powers, to go into the facts of the case and that too which were not relevant for the purposes of the decision. In short, this argument of Shri Dhorde can be said to be an additional facet of his earlier argument of "extraneous considerations".

28. Shri Dhorde, learned Counsel for the petitioner also has relied on the decision reported in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills, . This is a matter pertaining to the partnership and the position after the death of one of the partners, wherein it is held that on the death of one of the partners of the only two partners, the petitioner firm stands dissolved. It is further made clear that any contract to take the legal representatives of the deceased partners in the partnership firm will be new partnership firm and not continuation of the old partnership firm. In the present case, the petitioner had dissolved the firm by his notice and there is no question of continuation of the partnership thereafter. No doubt this position in that decision fully supports Shri Dhorde.

29. Shri Dhorde also has relied on the decision reported in Abbashbhai K. Golwala Vs. R.G. Shah and Others, , which also deals with the provisions of sections 41, 42, 43 and 44 of the Partnership Act. However, in this matter, since there were more partners than one, the proposition therein will be of no much help to Shri Dhorde.

30. Shri Dhorde further relied on a decision reported in *Deepak Theatre, Dhuri Vs. State of Punjab and others*, . It is a matter decided under the provisions of the Punjab Cinemas (Regulation) Act, 1952 and the Rules framed thereunder. While dealing with this matter, Their Lordships of the Supreme Court, dealt with the provisions of section 5 of the Act r/w Rule 4 thereunder and the condition 4-A of the licence observing that the same were of regulatory measure and it was well within the powers of the licensing authority to fix the rates of admission and classification of the sitting in the interest of general public. They do not impinge upon the fundamental rights to trade, avocation for business of the licensee under the Act. Shri Dhorde relied rightly on this decision to defuse the force in the argument of Shri Gursahani.

31. As against the above said argument, the learned Counsel appearing on behalf of the respondent No. 2 Shri Gursahani, strenuously argued that all the administrative powers in accordance with Rule 28 of the Rules, are vested in the Collector as regards transfer of license from one name to another or admit or delete the name of any partner after the license is granted. According to Shri Gursahani, it was not open for the Government to give suggestions or import certain conditions as regards, as is done in the present case, I am afraid, this argument of Shri Gursahani can be accepted at all. If the powers are vested in the Collector, Excise and if the higher authorities give certain directions which are administrative powers vested in the higher authorities including the State, it is not incompetent for that higher authority to put certain relevant conditions in the interest of the State revenue while issuing the relevant licence to the applicant. Shri Gursahani in support of his contentions relied on the decision of the Supreme Court reported in *Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others*, , and to be precise, para 18 thereof and to show that the Government had no power to deal with the matter when the power was vested in the Collector. With the help of the learned Counsel, I have gone through the said judgment and the interpretation or the ratio which Shri Gursahani tried to make out therefrom, does not appear to be correct. This is a case under the provisions of Telegraph Act, 1951 read with Telegraph Rules (1951) Rule 422, which deals with regard to the power of the authority and order of disconnection on the ground of misuse. In this case, it is held that the order of disconnection on the ground of misuse, suffer from apparent defect of jurisdiction and vitiated, as misuse could not be a ground germane to action under Rule 422 of the Telegraph Rules (1951). This case, therefore, in my opinion, cannot be said to be applicable to the present case. Shri Gursahani further made a proposition that the administrative instructions or circulars cannot run counter to the main object of the statutory provisions and the Rules framed thereunder. This proposition is developed by Shri Gursahani by arguing that it was not open for the Commissioner or even for the State Government to put any additional conditions by directing the authority concerned to include the same while granting license. I am afraid, this argument also of Shri Gursahani can be accepted. If this argument is to be accepted then it would be very difficult for the Government as

also the higher authorities in the Excise department to exercise powers vested in them and of having control over the Collector or the Licensing authority and those will be absolutely unbridled powers in the hands of the Collector of Excise alone.

32. Shri Gursahani further argued that the direction given by the Government, when the Government says that, "shall not claim", this direction is in total contradiction of Rule 28 of the Rules. In fact, Rule 28, as I have already referred to above, deals with transfer of licence and the permission by the Collector for transfer.

33. Shri Godhamgaonkar, the learned A.G.P. appearing on behalf of the State, pointed out that section 11 of the Act is a controlling section and section 52 deals with power of an authorised officer to grant, licenses, permits and passes in certain cases. The relevant section, according to Shri Godhamgaonkar is section 53 whereby it is competent on the part of the authorised officer to impose certain conditions regarding licence, etc. As per section 53, all licenses, permits, passes or authorisations granted under this Act, shall be in such a form and shall in addition to or in variation or substitution of any of the conditions provided by this Act, be subject to such conditions as may be prescribed and shall be granted on payment of prescribed fees. This clearly shows that the competent authority under the Act shall have certain powers to impose conditions as are necessary for the enforcement of the provisions of the Act. It is further clear from the provisions of section 53 that any license, permit, pass or authorization granted under the provisions of this Act and also subject to the conditions that the person applying therefore gives specific undertaking and further that the concerned officer is also of the opinion that the said person shall abide by all the conditions of the permit, pass or authorization is only entitled to get such a licence, permit or pass or authorization. The question is that when all these conditions are binding on the party concerned and when a particular party applying for the license, permit or authorization gives an undertaking for such abidance could it be said that, that person still further could contend that the said conditions are not valid and that too after voluntarily having submitted himself to those conditions. Shri Godhamgaonkar further pointed out that section 143 is in the nature of rule making powers of the Government. Section 143 empowers the Government to make rules for the purposes of carrying out the provisions of the Act or any other law for the time being in force relating to excise revenues. Clause (f) of sub-section (2) of section 143 deals with regulating the grant, suspend or cancellation of license, permit, pass or authorization for the import, export, transport (collection, sale and purchase), possession, manufacture (bottling), consumption, use or cultivation of any of the above articles mentioned in Clause (b) and for the matters specified in Clause (e). Clause (h-1) of sub-section (2) of section 143 prescribes certain restrictions under which and the conditions on which any licence, permit, pass or authorization may be granted. Shri Godhamgaonkar, therefore, rightly pointed out that in accordance with the provisions of Clause (vii) of Clause (h-1) of sub-section (2) of section 143 which

controls the regulation or prohibition of the transfer of license, if read with Clause (f) of subsection (2) of section 143 and Rule 24 clearly indicate that all those powers are vested in the authority concerned to impose all reasonable conditions which are necessary for effective implementation of the provisions of the Act. It would be necessary to make it clear at this stage that Rule 24 of the Rules deals with grant of licences wherein various fees are prescribed depending on various categories mentioned therein.

34. Shri Gursahani, the learned Counsel for the respondent No. 2 argued that neither was there any authority in the Commissioner to lay conditions for grant of license as is done in the present case nor was it competent for the State Government to put additional conditions that those which could have been put by the Collector. According to him, it is the only authority in whom the power is vested to act and the State could not do anything in that respect and the State had no power to usufruct the powers of the authority who was authorised to grant license. Shri Gursahani, for this proposition relied on the decision reported in *Nika Ram Vs. State of Himachal Pradesh*, , emphasising on para 14 therein. This is a case u/s 164 Criminal Procedure Code and the proposition laid down therein cannot be disputed. However, I am of the firm opinion that the said decision in no way is applicable to the facts of the present case. Shri Gursahani also tried to suggest that by putting additional conditions while granting the license, the State has virtually tried to defy the provisions of the statute and which, according to him, is not permissible. This argument can be negated by simple observation that the question of defying the provisions of the statute in the present case does not arise, particularly when it is well within the powers exercised by the authority u/s 143 of the Act. Therefore, the attempt of Shri Gursahani to seek support for the above said proposition from the judgment of the Supreme Court reported in *Miss Raj Soni Vs. Air Officer in Charge Administration* and another, , is of no use.

35. Shri Gursahani, then argued that if anything is done by the State against the statute cannot be said to be binding on the party agreeing to the same. He has also tried to argue that a party agreeing to any illegal terms or condition cannot be prevented from raising an objection to the same subsequently on that count. In short, Shri Gursahani wanted to suggest that the conditions to which the respondent No. 2 - Pradeep had agreed while getting his name inserted in the license C.L. III, were illegal and imposing of those conditions was beyond the authority of the State, the respondent No. 2 could not be bound by the same. According to him, neither could it be binding on the respondent No. 2 nor could he be estopped from contending that they were not binding on him. This argument of Shri Gursahani now cannot be entertained at this stage, much less when Shri Gursahani has failed to show that there was no authority either in the State or in the Commissioner to impose reasonable conditions, which were for the effective implementation of the law and the Rules.

36. Shri Gursahani further argued that it was open for the petitioner to have

referred the matter to arbitration, as according to him, the petitioner wanted to get the name of the respondent No. 2 deleted. In fact it was the respondent No. 2 who was aggrieved by the decision of the petitioner and hence it was for him to have referred the matter to arbitrator. In this respect, it would be necessary to further observe that in view of the conditions put in the partnership deed and also in view of the conditions put while granting the license, it was made clear and agreed to by the respondent No. 2 that the respondent No. 2 would have no claim over the license in any manner in case of dispute between the two. Since the petitioner dissolved the partnership firm as it was a partnership at will, if any one who could be said to have been aggrieved thereby was the respondent No. 2 alone and it was for the respondent No. 2 to have approached or to have taken recourse to other remedy if was available to him.

37. Shri Gursahani, the learned Counsel then relied on the decision reported in 1991 M.L.J. 770, in the matter of Nilesh alias Narayan Y. Jadhav v. State of Maharashtra and others. In this case F.L. licence, which was in the name of two partners, after the death of one of them, was sought to be transferred in the name of remaining members, which was refused by the Government on the ground that it was against the policy of the Government that not to transfer any excise licence in the name of a person who is not a member of original licensees family. In the instant case, the said decision is of no help to Shri Gursahani, because the dispute in the present matter is as regards the dissolution of partnership firm and that to whom the licence could go in terms of the conditions of the partnership deed. I do not feel that the citation placed in operation by Shri Gursahani is of any help to him.

38. The next decision relied on by Shri Gursahani in support of his contention is reported in Gujarat Housing Board Engineers Association and Another Vs. State of Gujarat and Others, . This matter relates to the service rules and regulations and mode of recruitment to the post of Assistant Housing Commissioner (Tech.) now known as Superintending Engineer by appointing a person on deputation in its service in Building and Communication Department, when it was not so provided in the rules and regulations, but the Government by special directions had asked to make the appointment thereby, by-passing the suitability of the Executive Engineers of Housing Board for appointment by promotion. In that case, as we see, there was no question of issuance of directions in furtherance of effective implementation of any Act or the Rules and hence the Government directions were held to be contrary to the provisions of the Act, as u/s 82 no such directions could be given in that case. Thus for the decision in the present matter, this case relied upon by Shri Gursahani is also of no help to him.

39. Shri Gursahani also tried to base his argument on the decision reported in A.C. Jose Vs. Sivan Pillai and Others, . This case pertains to the election matter laying down that it is not open to the authority concerned to over ride the Act/or the Rules and pass orders in direct disobedience of the mandate contained in the Act or the Rules. In order words, the powers of the authority are meant to

supplement rather than to supplant the law in the matter of superintendence, direction and control as provided under Article 324 of the Constitution of India. However, I am of the opinion that this case also in no way supports the contentions raised by Shri Gursahani.

40. Shri Gursahani, in support of his contention of promissory estoppel relied on the decision reported in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, . This case deals totally on the point of promissory estoppel and since in the instant case, there is no question of any promissory estoppel as no promise was extended by the Government in any manner, the said case also is wrongly being relied upon by Shri Gursahani.

41. The decision cited by Shri Gursahani, in the case reported in Chhotu Singh Vs. State of Maharashtra and Others, , pertains to the transfer or shifting of the shop of liquor from one village to another in accordance with the guidelines published in Government Circular dated 27th April, 1984. In this matter, there was no question of powers of the Government to issue Circulars nor was there any challenge to the Circular on that ground and hence the attempt on the part of the learned Counsel Shri Gursahani to derive certain support therefrom also fails.

42. Shri Gursahani also relied on two other decisions, reported in Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., , and Shri Krishnan Vs. The Kurukshetra University, Kurukshetra, . In the first case, the point was regarding the landlord and tenant and creation of sub-tenancy by the tenant with the permission of the landlord, which was in contravention of the provisions of section 15 of the Bombay Rent Act. The case is on the point that even if the sub-tenancy was created the tenant was liable to be evicted u/s 5 of the Act. In the instant matter, Shri Gursahani wanted to derive support from this case to show that even if he might have consented to the conditions of licence and terms of partnership, but since, according to him, the same were contrary to the provisions of Prohibition Act and Rules thereunder, he could not be said to have been bound by the same. I am afraid, this argument of Shri Gursahani can be accepted. In the another case, cited supra, i.e. Shri Krishnan Vs. The Kurukshetra University, Kurukshetra, , there was a question of admission of the students made in ignorance of the legal rights or under duress which could not be said to be binding on the maker of the admission. Shri Gursahani tried to suggest on the basis of this judgment that acceptance by him of the conditions of the licence and since the conditions were against law, according to Shri Gursahani, were not binding on him. Since none of the conditions in the licence could be said to be illegal, this argument of Shri Gursahani, therefore, also cannot be accepted and it can be said that Shri Gursahani has wrongly placed his reliance on this decision.

43. Shri Gursahani further argued that the Collector and the Commissioner virtually have decided the civil rights of the parties. I do not feel that this argument of Shri Gursahani could be said to be of any substance. If any civil

rights are there in the parties and if anybody's civil right is prejudicially affected, then it would be only of the respondent No. 2 and the respondent No. 2 could have resorted to appropriate remedy. The question of deciding any civil rights either by the Collector or the Commissioner does not arise as the authority concerned has decided the matter well within the compass of the provisions of the Bombay Prohibition Act and the Rules framed thereunder. I do not find that the order passed by the respondent No. 1 Secretary can be said to be worthy of being sustained in law. No justifiable reasons have been given by the respondent No. 1 to upset and set aside the well-reasoned orders passed by the Excise Authorities below. The order passed by the respondent No. 1 is based on extraneous considerations and on far stretched facts. In the circumstances, I have no hesitation in observing that the order passed by the respondent No. 1 is per se illegal and against law.

44. During the course of arguments, the present respondent No. 2 - Pradeep Jaiswal, filed Civil Application No. 5274/1996 producing therewith three documents and further seeking reply to the interrogatories from the petitioner. The same was duly replied by counter affidavit by the petitioner, denying the execution of those documents. On this application, I had then told the parties that appropriate orders will be passed during the course of judgment. I have no hesitation in any manner in rejecting the said application, particularly when that relates to the disputed questions of fact.

45. In the circumstances, the order dated 22nd July, 1993, passed by the respondent No. 1 - Secretary to the Government, Home Department, Bombay, is hereby quashed and set aside and the orders passed by the Excise Authorities below are hereby confirmed. Needless to mention that the name of the respondent No. 2 - Pradeep Jaiswal shall stand deleted from the license C.L. III No. 133.

46. In the result, Rule is made absolute and in the circumstances of the case, the petition is allowed with costs.

After pronouncement of the judgment, Shri Gursahani, the learned Counsel for respondent No. 2 has requested to keep the effect and operation of this judgment suspended till 20th June, 1997. I do not wish to stay the effect and operation of the judgment. Request, therefore, cannot be granted. Copy of the judgment, if desired, be given out of turn.

47. Petition allowed.