IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 717 OF 2015

Shri Abhishek Mishra,
s/o Girijashankar Mishra,
r/o L.T. No. E-4, Romano Chambers,
Porbavaddo, Calangute,
Bardez, Goa. … Petitioner

Versus

1. The State of Goa,
   through its Chief Secretary,
   having office at Secretariat,
   Porvorim, Goa.

2. The Commissioner of Excise,
   Government of Goa,
   Panaji, Goa. … Respondents

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Mr. Nitin Sardessai, Senior Advocate with Mr. Vibhav Amonkar, Advocate for the Petitioner.

Mr. Pravin Faldessai, Additional Government Advocate for the Respondents.

Coram : F.M. REIS &

C.V. BHADANG JJ.

Date : 21st December, 2015.

JUDGMENT: (Per C.V. Bhadang, J.)

Rule. Rule made returnable forthwith. The learned Additional Government Advocate waives service for the respondents. Heard finally, by consent of the parties.

2. By this petition, the petitioner is challenging the memorandum dated 28.10.2013, issued by the Superintendent of Excise, whereby the application of the petitioner for grant of liquor license for retail sale of IMFL, CL and FL has been rejected. The petitioner is also challenging the communication dated 09.02.1989, issued by the Under Secretary, Department of Finance (Revenue and Control) and in particular, clause 3 thereof, by which the Excise Authority has been asked to ensure that people with criminal background/police record should not be given liquor license for "obvious reasons". The Excise Commissioner has been asked to ascertain from the I.G.P. as to whether there is any record person seeking such license.

3. Sometime in the year 2012, the petitioner started the business of Bar and Restaurant in the name and style as "Cricketers" Bar and Restaurant in the building known as Falcon Resorts at Naik vaddo, Calangute, Bardez, Goa. The petitioner had procured all the licenses from the Authorities concerned, for operation of the business. In February, 2013 a conditional license was granted to the petitioner for a period of

60 days. On 13.05.2013, another conditional license was granted to the petitioner for the period from 13.05.2013 to 31.05.2013. Subsequently, as per the impugned memorandum, the petitioner was informed that as he is involved in criminal cases at Calangute and Porvorim Police Station (as per the report of the Superintendent of Police (North), Porvorim, Goa), the request for grant of liquor license has been rejected.

4. The details of the criminal cases/police record against the petitioner are as under:

(a) Crime No. 71/2012 registered with the Calangute Police Station under Sections 394, 452, 327, 506(ii) read with Section 34 of I.P.C.
'A' Summary report dated 20.01.2014 has been submitted and the same is allowed by the learned Judicial Magistrate First Class at Mapusa.

(b) Crime No. 32/2009 registered with the Porvorim Police Station under Sections 3, 4, 5, 6 and 7 of the Immoral Traffic (Prevention) Act.
'A' summary report has been submitted and

the same is allowed by the learned Judicial Magistrate First Class at Mapusa on 19.03.2013.

(c) Crime No. 41/2013 registered with Anjuna Police Station under Sections 341, 324, 427 read with Section 34 of I.P.C.
The petitioner has been acquitted by the Court of the learned Judicial Magistrate First Class at Mapusa vide its order dated 30.09.2014.

(d) Crime No. 261/2012 registered with Calangute Police Station under Section 387 read with Section 34 of I.P.C.
The same is pending trial. It is pertinent to note that charges have not been framed in the above case.

(e) Crime No. 57/2014 registered with the Calangute Police Station under Section 370 of I.P.C and Sections 3, 4, 5, 6 and 7 of the Immoral Traffic (Prevention) Act.
No charge sheet has been filed in the above case.

(f) Crime No. 18/S/2015 registered with Crime Branch under Section 370 and Sections 3, 4, 5, 6 and 7 of the Immoral

Traffic (Prevention) Act.
The same is pending trial. It is pertinent to note that charges have not been framed in the above case.

(g) In addition to the above, there are two chapter cases pending against the petitioner.

5. We have heard Mr. Sardessai, the learned Senior Counsel for the petitioner and Mr. Faldessai, the learned Additional Government Advocate for the respondents.

6. It is submitted by Mr. Sardessai, the learned Senior Counsel for the petitioner, that the expression "criminal background" as contained in the impugned memorandum is vague and incapable of any precise definition. It is contended that the expression does not make any definite reference as to whether it refers to a person accused, (but not charged or convicted) of an offence, or a person charged (but not convicted) of an offence or only a person convicted of an offence. It is contended that thus, the restriction imposed by the letter is both, vague and arbitary and cannot be said to be a reasonable restriction, as required by law. It is submitted that the said restriction would be in breach of Article 19(1)(g)

of the Constitution of India.

7. It is submitted that it is the fundamental rule of criminal jurisprudence that any person is innocent till he is proved guilty. It is submitted that thus, the petitioner cannot be branded as a criminal or having a criminal background on account of pendency of cases, in which, not even charge is framed. Reliance is placed on the decision of the Hon'ble Supreme Court, in the case of **Manoj Narula Vs. Union of India**, reported in **(2014) 9 SCC 1**.

8. It is submitted that the Under Secretary (Finance) would have no authority to lay down any such requirement as contained in para 3 of the communication dated 09.02.1989. It is submitted that the Goa Excise Duty Act, 1964 (the Act of 1964, for short) and Rules thereunder, make provisions for grant of such licenses. The requirement tried to be introduced by para 3 of the impugned communication cannot supplant/override the provisions of the Act and the Rules. In other words, it is submitted that by a mere communication, the Under Secretary (Finance) could not have prescribed any such condition, in the face of the provisions of the Act of 1964 and

the Rules framed thereunder. Reliance is placed on the decision of the Hon'ble Supreme Court, in the case of **State of W.B. and Others Vs. Vishnunarayan & Associates (P) Ltd. and Another**, reported in **(2002) 4 SCC 134**.

9. On the contrary, it is submitted by the learned Additional Government Advocate on behalf of the respondents that there is no fundamental right under Article 19(1)(g) of the Constitution, in a citizen to deal in the business of vending of liquor. It is submitted that liquor is 'res extra commercium' and as such, the considerations based on the Article 19(1)(g) cannot arise in this case. It is pointed out with reference to para 4 of the affidavit in reply filed by Shri Menino De Souza, the Commissioner of Excise that the communication dated 09.02.1989 is a policy regarding grant of liquor license to the restaurants at tourism points, which is being followed since the year 1989. Reliance is placed on behalf of the respondents on the decisions of the Hon'ble Supreme Court in the case of **Khoday Distilleries Limited and Others Vs. State of Karnataka and Others**, reported in **(1995) 1 SCC 574** and **State of Kerala and Others Vs. Kandath Distilleries**, reported in **(2013) 6 SCC 573**, in order to submit that a

liquor license cannot be granted as a matter of right and the State can always adopt a restrictive policy. It is submitted that the criminal background/police record can always be taken into consideration in order to determine the suitability of the person for grant of the liquor license. It is submitted that the provisions of the Act and the Rules, which are statutory in nature can always be supplemented by policy decision/administrative instructions, which has been done by the communication dated 09.02.1989. It is thus submitted that in the absence of any right in the petitioner and a corresponding duty, constitutional/statutory or otherwise on the Authorities, no relief as prayed, can be claimed or granted.

10. We have given our anxious consideration to the rival circumstances and the submissions made.

11. A Constitution Bench of the Hon'ble Supreme Court, in the case of **Khoday Distilleries Limited and Others** (supra), has held that a citizen has no fundamental right to trade in liquor as a beverage and the activities which are res extra commercium, cannot be carried out by the citizen. It is held that the State can prohibit completely the trade or

business in potable liquor since liquor as beverage is res extra commercium.

12. In a more recent case of **Kandath Distilleries** (supra), it has been *inter-alia* held that the State has power to frame and re-frame, change and re-change, adjust and re-adjust policy, which cannot be declared as illegal or arbitrary on the ground that the earlier policy was a better and suited to the prevailing situation. The Hon'ble Apex Court after noting the permissive expressions, such as (i) "Commissioner may, (ii) "if he is satisfied" and (iii) "license may be issued" under the Kerala Abkari Act and the Rules framed thereunder, held that the same confer discretionary power, not coupled with a duty, as the subject matter dealt with, is exclusive privilege of the State. It cannot however be disputed that, within the aforesaid privilege and the discretion, the State has to act fairly and cannot discriminate against the persons seeking such license.

13. Rule 90 of the Rules of 1964 provides application and procedure for the license. Rule 90(1) thereof, prescribes that such an application has to be made to the Commissioner

in Form E-28. Rule 90(2) of the said Rules provides that the Commissioner "after making such enquiry as he thinks necessary, with regard to the particulars stated in the application", may grant a license applied for.

Much emphasis was laid on behalf of the petitioner on Rule 90 (2) of the said Rules read with the contents of Form E-28, in order to submit that the enquiry by the Commissioner in such cases will have to be restricted to the particulars stated in the application. It is submitted that Rule 90(4) of the said Rules provides certain restrictions as to the location of the premises where the proposed liquor shop is to be opened. It is submitted that the conjoint reading of Rules 90(2) and 90(4) of the said Rules, read with Form E-28, would indicate that such enquiry may, in given case pertain to the locality of the premises and such other matters.

14. We are not inclined to accept the submission as made for the reason that the same overlooks the provisions of Rule 90(3) of the said Rules, which says that the Commissioner will however, not be bound to grant a license applied for and "may for the reasons to be stated in the application", "may grant a license applied for". Thus, the permissive expressions

used herein are similar to the ones used in the Kerala Abkari Act and the Rules framed thereunder, in the context of which the Hon'ble Supreme Court, in the case of **Kandath Distilleries** (supra), held that the same confer discretionary power not coupled with a duty, as the subject matter dealt with, is the exclusive privilege of the State.

15. This takes us to the communication dated 09.02.1989. In the affidavit in reply of Shri Menino De Souza, the respondents claim that it is a policy decision. It was also submitted that it would be a inter Departmental communication based on such policy decision. Considering the discretion conferred on the Commissioner, in terms of Rule 90 of the said Rules and the fact that there is no right to trade in liquor, it being 'res extra commercium', we do not find that the communication can be challenged or frowned upon, on the ground of absence of competence. We find that in appropriate cases, the statutory provisions in this regard can always be supplemented by a policy decision and/or administrative instructions.

16. It was submitted by Mr. Sardessai, the learned

Senior Counsel for the petitioner that the effect of the communication would be to confer unguided and untrammeled power/discretion on the concerned Authority, which would be arbitrary, which cannot be conceded to any statutory authority, which is bound to act in accordance with law. The learned Senior Counsel submitted that there is a possibility of such a requirement being misused for ulterior purpose, as in a given case in order to prevent a legitimate applicant from getting a license, false and frivolous complaint may be lodged, may be by a business rival. The learned Senior Counsel would submit that in some other cases, the applicant may be only facing a trivial offence, for example, violation of some traffic rules, preventing the applicant from getting a liquor license. The learned Senior Counsel was at pains to point out that the registration of the offence/police record in such a case would have no nexus with the object of grant of license to a person who may be otherwise eligible for grant of the same.

17. The learned Senior Counsel submitted that in two, out of five cases, the police have filed 'A' summary report, while in the three remaining cases, charges are not framed. It is submitted that mere filing of charge sheet under the

Immoral Traffic Prevention Act, would not be sufficient to deny a liquor license. It is submitted that apart from the five criminal cases, the other two cases are chapter cases under the Criminal Procedure Code.

18. We have given our thoughtful consideration to the submissions made. We do not propose to dwell upon the aspect as to the possibility of a false report being lodged against an aspirant and/or it being a trivial offence. In our considered view, the competent Authority will have to look into this aspect alongwith all attending circumstances in order to decide whether the application for grant of liquor license needs to be granted.

19. In the case of **Manoj Narula** (supra), a Constitution Bench of the Hon'ble Supreme Court, was concerned with the question, whether the Prime Minister/Chief Ministers can be directed not to include persons with criminal background as Members of the Council of Ministers. It was in this context observed in para 121 of the judgment that the expressions “criminal antecedents” or “criminal background” are extremely vague and incapable of any precise definition. The question

was also examined in the context of the constitutional provisions, and Section 8 of the Representation of the People Act, 1951, as to who could be the Member of the Council of Ministers. The Hon'ble Apex Court held that in view of the constitutional provisions and the provisions contained in Section 8 of the Representation of the People Act, 1951, it is not possible to read additional qualification/disqualification for being the Member of the Council of Ministers. However, at the same time, it was held that the constitution reposes faith in the high constitutional functionaries, such as the Prime Minister/Chief Minister and they will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed in respect of offences involving moral turpitude and also offences, specifically referred to Chapter-III of the Representation of the People Act, 1951.

20. In the case of **Parvez Khan** (supra) the challenge was to to the refusal by the competent Authority to grant compassionate appointment in the police service to the respondent, on the ground of criminal antecedents, who was acquitted for want of evidence or was discharged on account of compounding. It was held that a candidate to be recruited to

the police service must be worthy of confidence, of utmost rectitude and must have impeccable character. It was held that the person having criminal antecedents would not fit into such category since even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated.

21. In the case of **Vishnunarayan & Associates (P) Ltd.** (supra), the question was about eviction of unauthorised occupants in the context of Section 6 of West Bengal Government Premises (Tenancy Regulation) Act, 1976. It was held that the State and its Executive Officers cannot interfere with the rights of the others, except where the activities are authorised by specific provisions of law. In the present case as noticed earlier, there is no fundamental or a constitutional or other rights in the petitioner to trade in the liquor and as noticed earlier, the later merely seeks to supplement the considerations, which may be examined, while considering the application for grant of liquor license.

22. In this regard, several situations may arise in the context of such criminal cases/police record, which would give rise to different considerations. There would be myriad

circumstances which cannot be set out exhaustively. However, for instance, there may be a case where a final summary is filed. The question would arise as to what is the nature of the final summary, namely, 'A', 'B' or 'C' final summary as contemplated in the Criminal Manual. The other considerations would be the nature of the offence charged and whether the charge is framed. Even in the case of acquittal, the question would arise as to, whether it was on account of compounding or non-examination of a material witness or one giving benefit of doubt or a clear acquittal. In our considered view, it will have to be left to the discretion of the concerned Authority. We find that in the present case, the application has been rejected only on the ground of the communication dated 09.02.1989. We therefore, find that the application can be sent back to the concerned Authority, for reconsideration, in accordance with law.

23. There is one more reason as to why we are inclined to send the application back to the concerned Authority. Undisputedly, after the impugned memorandum, rejecting the application for grant of liquor license was issued on 28.10.2013, the competent Authority had granted a temporary

license to the petitioner on 01.11.2013. The said license was subsequently cancelled on 05.11.2013. A perusal of the letter dated 05.11.2013 would show that the competent Authority had found that the Village Panchayat had resolved not to renew the establishment license of the petitioner. The communication further reveals that the competent Authority had taken note of the order dated 29.10.2013 of the Additional Director of Panchayat, granting stay to the resolution passed by the Village Panchayat, however the competent Authority was of the view that as on that date, the petitioner was not possessing any license from the Village Panchayat to do the business and the same had expired. It can thus be seen that shortly after the application for permanent license was rejected on 28.10.2013, a temporary license came to be granted on 01.11.2013 and although, that was recalled on 05.11.2013, it was not on account of the petitioner having any criminal background/police record. We thus find that it would be appropriate that the competent Authority re-considers the application in the light of all the attending circumstances, in accordance with law.

24. In the result, the following order is passed:

(a) The petition is partly allowed.

(b) The impugned memorandum dated 28.10.2013 is hereby set aside.

(c) The competent Authority shall decide the application of the petitioner, for grant of liquor license, afresh, in accordance with law and particularly, in view of Rule 90 of the Rules of 1964.

(d) The application shall be decided within a period of two months from the receipt of this order.

(e) Rule is made absolute, in the aforesaid terms, with no order as to costs.

C.V. BHADANG, J. **F.M. REIS, J.**

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