

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.9086 OF 2014
IN
R.V.N. 1212 /R.A.-449/E.X.C.-3
IN
APPEAL NO. 294 OF 2008**

Shri. Ishwateshwar Siddheshdeep
Co-op. Housing Society Limited,
A Society registered under the
provisions of Maharashtra Co-op.
Societies Act, Having it's registered
Office at 153-154, Patthe Bapurao
Marg, Rushi Mehta Chowk,
Grant Road (E), Mumbai – 400 008 Petitioner
(Ori. Appellant)

Vs.

- 1 The State of Maharashtra
Through The Department of State
Excise & New and Renewable Energy
Mantralaya, Mumbai – 400 032
- 2 The Hon'ble Minister
The Department of State Excise
and New and Renewable Energy,
Mantralaya, Mumbai – 400 032
- 3 The Collector of Mumbai,
Mumbai City Division, having his
office at Old Customs House, Fort,
Mumbai – 400 023

- 4 Suptd. of State Excise,
Mumbai City Division,
having his office at old Custom House,
Fort, Mumbai – 400 023
- 5 Commissioner of State Excise
Maharashtra State, having his
office at old Custom House,
Fort, Mumbai – 400 023
- 6 Laxmi Country Liquor Bar
CL-III No. 145, Shop No.32,
Shri. Ishwateshwar Siddheshdeep
CHS, Patthe Bapurao Marg,
Rushi Mehta Chowk,
Grant Road (E), Mumbai – 400 008 Respondents.

Mr. Rajesh S. Patil alongwith Mr. Meet Sawant alongwith Sana Khan, Advocate for the Petitioner.

Ms. Vaishali Nimbalkar, AGP for Respondents no. 1 to 5.

Mr. Yogesh Patki alongwith Mr. A.S. Ramesan, Advocate for Respondent no.6

Mr. Y.G. Rathod, Deputy Superintendent of State Excise, Mumbai present.

Coram : **Smt. R.P. SondurBaldota, J.**

Date : 28th November, 2016

JUDGMENT :

1. By consent of the parties, this petition is heard finally at the stage of admission.

2. This petition raises for consideration of the court a highly contentious issue of permitting a country liquor bar to run from the premises of a residential Co-operative Housing Society. The petitioner is the Co-operative Housing Society. Respondent no.3 is the Collector of Mumbai City Division, who issues licence under the Bombay Prohibition Act, 1949 (the Act, for short) read with the Maharashtra Country Liquor Rules, 1973 (the Rules, for short). He is assisted in this regard by respondent no.4, the Superintendent of State Excise. Respondent no.5, the Commissioner of State Excise is the Appellate Authority. Respondent no.1 is the State of Maharashtra and Respondent no.2 is the Cabinet Minister having the portfolio of Department of State Excise.

3. The facts alleged in the petition stated in brief are as follows:

Prior to the year 2003-2004, the members of the petitioner-society were tenants of “Nagoo Sayaji Chawl” (the Chawl for short). The chawl was spread over a large portion of land at plot no. 153 and 154 of Tardeo Division with several single storied structures. In the year 2003-2004, the chawl was demolished for the purpose of redevelopment and a single multi-storied building was constructed with 180 flats. All the members of the petitioner belong to middle class strata of the society.

4. One Sadanand Shetty was the tenant of shops no. 7 and 8, of the Chawl No. 40-64 and had been running a country liquor bar therefrom in the name and style of Laxmi Country Liquor Bar (respondent no.6) since the year 1985 under Licence No. C.L. III 145 issued under the Prohibition Act and the Rules. The licence has been renewed from time to time. Like any other tenant in the chawl, Sadanand Shetty had entered into Memorandum of Understanding with the promoter developer by name Manav Builders Pvt. Ltd. for permanent alternate accommodation in the new building. While the new building was under construction, respondent no.6 continued with its business from the old premises under the No Objection Certificate issued by Manav Builders. Later Sadanand Shetty has been allotted shop no.32 in the new building as permanent alternate accommodation vide agreement dtd. 16th January, 2008. Thereafter, Sadanand Shetty has executed Leave and Licence Agreement in favour of Sadashiv Shetty in respect of the premises.

5. The old premises of respondent no.6 i.e. Shops no.7 and 8 were located in the outermost building of the chawl. The permanent alternate accommodation of Shop No.32 to Sadanand Shetty is located on the ground floor of the building of the petitioner. With all the tenants in the chawl, now being located in one building, they experienced excessive nuisance and harassment with the running of the country liquor bar at close quarters. They therefore made several complaints in writing to the Managing

Committee of the petitioner. They had also complained to respondent no.3, the Collector and police authorities. The petitioner then made written complaint dated 7th September, 2007 to respondent no.1 and requested it to look into the matter and not to renew, the licence to sell country liquor, issued to respondent no.6. It pointed out in the letter that the shop of respondent no.6 was in close proximity to a school and a mosque. Also at the relevant time respondent no.6 was carrying the business illegally.

6. In response to the letter of the petitioner the officers of respondent no.3 visited the petitioner's building on 11th June, 2008 for inspection. They measured the distance between the shop of respondent no.6 and the school and the mosque. The authority then prepared report dated 11th June, 2008 which was objected to by the petitioner by its advocates letter dated 19th June, 2008. The petitioner alleged that the report had already been kept ready by the officers and a show was made of preparing it in the presence of the members of the petitioner. It therefore requested that no licence should be issued to respondent without granting personal hearing to the petitioner.

7. In total disregard to the petitioner's request, respondent no.3 by his order dated 3rd July, 2008 granted renewal of licence to respondent no.6. On hearing about the same the petitioner again complained by its letter dated 12th August, 2008 pointing out that no personal hearing was given to it and there was

violation as regards the compulsory distance to be maintained. Respondent no.3 then along with its covering letter dated 16th September, 2008 forwarded copy of the order dated 3rd July, 2008 to the advocate for the petitioner. In the letter he referred to the “no objection” given by Manav Builders and claimed that there was no violation of the rules as regards the distance.

8. Being aggrieved by the order the petitioner preferred an appeal to respondent no.5 being Appeal No.294 of 2008. It also got the distances between the school, the mosque and the bus-stops measured through an architect and submitted the same. It pointed out that as per Rule 24 of the the Rules, no licence can be granted in respect of a shop situated within a distance of 100 meters from any bus-stop and within a distance of 50 meters from any educational and religious institution. As per the measurements taken by the architect of the petitioner the shop of respondent no.6 is situated hardly 10 meters away from a Best bus stop and two shops away from a Municipal School.

9. The petitioner alleged that the final hearing of the appeal was fixed by respondent no.5 on 1st August, 2012. On that day respondent no.5 neither allowed the advocate for the petitioner to advance arguments nor permitted him to file written submissions. This was placed on record by the advocate (on the same day) by sending a letter. He also forwarded written submissions along with copies of 27 decisions of the Apex Court

and various High Courts in support of the submissions. Respondent no.5 dismissed the appeal by the order dated 11th September, 2012.

10. The petitioner then preferred Revision Application to respondent no.2 being R.V.N.1212/R.A.449/E.X.C-3. On 8th January, 2013 respondent no.2 heard the petitioner on the revision but did not pass orders thereon for a long time despite several reminders from the petitioner. Consequently, the petitioner was constrained to file Writ Petition No.3930 of 2014 in this Court. In that petition by way of an interim order the petitioner sought a direction to respondent no.3 not to further review the country liquor licence of respondent no.6. Despite service of the petition upon them respondent nos.1 to 5 failed to give instructions to the Additional Government Pleader appearing for them. After adjourning the petition a couple of times this Court by the order dated 11th April, 2014 granted ad-interim relief in the abovementioned terms. The petitioner finally, on 24th June, 2014, sought information under Right to Information Act regarding renewal of licence in favour of respondent no.6. The office of respondent no.3 by its letter dated 8th July, 2014 informed the petitioner that the licence had already been renewed on 4th April, 2014. Later the petitioner was informed by the letter dated 4th August, 2014 that respondent no.2 had decided the revision application on 24th July, 2014. He held that the distance between the shop of respondent no.6 and the educational institution,

religious institution and the bus-stop is within the permissible limits under the Rules. However, he remanded the matter to respondent no.5 on a limited issue of validity of the Leave and Licence Agreement between respondent no.6 and the original owner of the shop. Thereafter the petitioner has approached this Court with the present petition under Articles 226 and 227 of the Constitution of India.

11. The grounds on which the petitioner seeks to challenge the decisions of respondent nos.2,3 & 5 are that the Authorities failed in appreciating the decisions of the Apex Court that the provisions and Rules as regards issuance of liquor licence are to be strictly complied with. The restrictions and conditions imposed by the State in granting licence for trade or manufacture and/or sale of liquor is as per the mandate of Article 47 of the Constitution of India and the restrictions thereon ensure safety, health, peace, order and morals of the community. The manufacture and sale of liquor is a business which is attended to a danger to the community. According to the petitioner the Authorities failed to carry out proper survey of the area, take measurements and figure out whether the educational institutions, religious institutions and the bus-stand is within the prohibitory distance from the new premises allotted in lieu of old shop nos.7 & 8. They erred in not appreciating that the bus-stops are at a distance of 21 meters and 26.83 meters from the new premises. The respondents also failed in appreciating the extent of nuisance, annoyance and harassment

caused to the members of the petitioner, embarrassment to the women living in the building as also the passers-by, and the influence on children and students. According to the petitioner grant of country liquor licence to respondent no.6 is an arbitrary act on the part of the respondents. According to the petitioner the grant of licence for the new premises will amount to grant of fresh licence to respondent no.6 and not mere renewal of the old licence. The other grievance of the petitioner is that it had not been afforded adequate hearing by respondent no.3 while deciding the appeal.

12. The only counter to the present petition is by respondent no.6 who has filed affidavit in reply to oppose the petition. It claims that it has been operating a country liquor bar under the name of “Laxmi Country Liquor Bar” since the year 1985 under licence no.C.L. III 145 issued under the Act and the Rules. When the licence was initially granted it was in respect of shop nos.7 & 8 in the chawl. The licence was renewed from time to time. On redevelopment of the property of Nagoo Sayaji Chawl, the tenant in respect of shop nos.7 & 8 has been allotted shop no.32 in the newly constructed building. While redevelopment work of the Nagoo Sayaji Chawl was in progress respondent no.6 had continued to carry out the business of selling country liquor from shop nos.7 & 8 under the No Objection Certificate issued by Manav Builders. Thereafter, the business is shifted to the new premises. As such there is continuation of legally approved

business of selling country liquor from shop no.32. This respondent denied that no adequate hearing was given to the petitioner by any of the Authorities in the various proceedings filed by it. It contends that the appeal preferred by the petitioner was only on two grounds; the first ground is the alleged nuisance caused by the customers of respondent no.6 and the second is the distance between the country liquor bar and the school and the mosque. According to this respondent it cannot be held responsible for the activities committed outside its licenced premises by its customers and the petitioner if aggrieved needs to seek redressal from the appropriate Authority. As regards the distance from the educational and religious institutions this respondent claims that the same is within the permissible limits. This according to the respondent is reflected in the panchanama drawn on 6th June, 2008 when respondent nos.3 & 4 carried out actual measurements at site.

13. As regards the revision preferred by the petitioner before respondent no.2 it is contended that the same was not maintainable since the Act does not specifically provide for challenge to the order passed by respondent no.5 in exercise of its appellate jurisdiction. The revision preferred by the petitioner before respondent no.2 tantamounts to filing of an appeal which is not permissible under the Act.

14. Extensive arguments have been advanced by the

parties before this Court. The petitioner and respondent no.6 have also filed written submissions. Before advertizing to the submissions as also the decisions relied upon by both the sides it would be convenient to note at this place the origin of the Bombay Prohibition Act through its Statement of Objects and Reasons. Para 1 of the Statement of Objects and Reasons as published in the Bombay Government Gazette, December 28, 1948 which is relevant for the present purposes reads as under:

“The policy of Prohibition was initiated in 1939. Soon after its initiation the popular Government went out of office and for various reasons the enforcement of the policy remained dormant. On the assumption of the office in 1946 Government reconsidered the question and it was decided to undertake and enforce a policy of total prohibition in the whole of the Province of Bombay on the basis of a four year plan. The said policy has been explained in a press communique published on 31st December 1946. It was stated therein that total prohibition simultaneously throughout the Province would be completed within four years beginning from April 1947. The programme was to begin from the financial year 1947-48 and end in 1950-51. For the first three years it was to be a sort of temperance arrangement which was to evolve itself into complete prohibition in the fourth year, i.e. 1950-51. The period of one year has been completed and we are close to the end of the second year. Taking into account the experience gained so far Government now feel confident to carry on and complete the programme.”

Over the period of time though the Act has been amended from time to time, its preamble remains the same i.e.

“WHEREAS it is expedient to amend and

consolidate the law relating to the promotion and enforcement of and carrying into effect the policy of Prohibition; and whereas it is also necessary to amend and consolidate the Abkari law in the State of Bombay for the said purpose and to provide for certain other purposes hereinafter appearing.”

(emphasis supplied)

Though preamble has remained the same the approach and the attitude of the government to the policy of prohibition has apparently changed drastically. This is reflected in the Preface written by the Commissioner of State Excise, Maharashtra State Mumbai to the modified Maharashtra Excise Manual published on 29th February, 2012. The relevant part is:

“The State Excise Department of the Government of Maharashtra has an interesting past and promising future. The department controls and regulates the trade in intoxicants of which liquor forms the major part. The law relating to intoxicants including liquor and the excise duties thereon was initially administered by the Excise Department in this State till June, 1949. With repeal of the Bombay Abkari Act, 1878 and introduction of Bombay Prohibition Act, 1949 with effect from 16th June, 1949, the Excise Department was renamed as Prohibition and Excise Department and was made responsible for enforcement of and education on prohibition. The State Government followed strict prohibition policy till December, 1963. The policy of prohibition was partially relaxed and step by step rationalization occurred. Initially, toddy was introduced, later on manufacture of potable liquor was allowed, then country liquor scheme was introduced, so on and so forth. The Department was again renamed as State Excise Department in the year 1990.”

(emphasis supplied)

It is obvious from the above that there is definite deviation in the approach of the State Government from the total prohibition contemplated in the Statement of Objects and Reasons to liberalisation.

15. Having noted the objects and reasons of the Act and its purpose, against background of which the provisions of the Act and the Rules are to be considered, it is now necessary to note the provisions on which the petitioner relies upon. The same are:

24. *Grant of licence* : (1A) The Collector shall in conformity with the committee's recommendations and after satisfying himself that the premises proposed for location of the shop for selling country liquor are in conformity with the provisions of the rules and instructions issued in this behalf by the State Government or the Commissioner from time to time and that there is no objection to grant the licence applied for, may inform the applicant of the decision and grant the licence in form CL-III on payment of the fee (inclusive of consideration) prescribed in the sub-rule (13).....

24(2A) Any person desiring to renew a licence shall, thirty days before the date of expiry of the licence, apply for the renewal thereof. Every such application shall be accompanied by a challan evidencing payment of a fee.

24(3) Any licence granted under sub-rule (1A) shall be renewed by the Collector for a period not exceeding one year at a time on payment of fees on the scale mentioned hereunder, unless the Collector has reason to believe that there has been a breach of any of the terms and conditions of the licence, or that the retail licensee has not been working it properly.

24(4b) which, if situated in areas within the jurisdiction of any Municipal Corporation or 'A' Class or 'B' Class Municipal Council, is within a distance of fifty metres and, if situated elsewhere, one hundred metres, from any educational or religious institution; or

24(4c) which is situated within a distance of one hundred metres from any bus stand, station or depot of the Maharashtra State Road Transport Corporation.

24(4) *Explanation* (i)

(ii)

(iii) the distance referred to in clause (b) or (c) of this sub-rule shall be measured from the mid-point of the entrance of the shop along the nearest path by which pedestrian ordinarily reaches, -

(a) the mid-point of the nearest gate of the institution if there is a compound wall and if there is no compound wall, the mid-point of the nearest entrance of the institution, or

(b) the mid-point of the nearest gate of the bus stand, station or depot of the Maharashtra State Road Transport Corporation, if there is a compound wall and if there is no compound wall, the nearest point of the boundary of such bus stand, station or depot.

16. There are two preliminary objections raised by respondent no.6 to the present petition and the reliefs sought therein. First objection is to the locus standi of the petitioner and the second is to the maintainability of the petition. Mr. Patki, the learned Counsel for respondent no.6 submits that the petitioner had no locus standi to file an appeal under Section 137 of the Act to respondent no.5 against the letter dated 3rd July, 2008 inasmuch as the letter merely communicated to respondent no.6 that it's

business could continue in the place allotted to it on redevelopment. For this very reason the communication of the grant was only to respondent no.6 and not to the petitioner. Hence the appeal as filed was not maintainable. Consequently, the revision against that and thereafter the present petition is not maintainable. The second objection is based on the maintainability of the revision before respondent no.2. It is contended that the proviso to Section 137 of the Act bars appeal to the State Government against the order passed by the Commissioner of State Excise as an appellate authority. The right of an appeal being a creature of statute and not an inherent right, there could not have been a resort to the revisionary power of the State Government under Section 138 of the Act by the petitioner, to challenge the order of respondent no.5 passed in his capacity as an appellate authority. If that is permitted the proviso to Section 137 of the Act will be rendered otiose.

17. Mr. Patil, the learned advocate for the petitioner submits in reply that the objections raised by respondent no.6 are hyper-technical in nature. According to him such stand if allowed to be taken in the facts and circumstances of the case would be destructive of the rule of law as considerations of public health, welfare of the citizens, women, young girls and boys and children would be most relevant for grant of such licences. He refers to fundamental right for a citizen protected under Article 21 of the Constitution of India and the Directive Principle of the State policy

at Article 47 thereof in support of his submission. The two provisions read as under:

Article 21 – Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 47 – Duty of the State to raise the level of nutrition and the stand of living and to improve public health – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

Mr. Patil submits that the above provisions have been considered by our High Court, in the very context as in the present petition, in ***Shailaja Rajendra Badwaik & Ors. V/s. Honble Minister, Department of State Excise & Ors.*** reported in ***2012 (5) Bom.C.R. Page 709 (Nagpur Bench)***. The observations relied upon by him read as under:

“Article 47 is contained in the chapter, namely 'Directive Principles of State Policy'. It is true that Directive Principles in Part IV of the Constitution cannot be enforced like a fundamental right. But the apex court has time and again asserted the importance of directive principles of State Policy and their implementation or enforcement. It is well settled that under the constitution there is no constitutional right to trade in liquor nor there is any fundamental right to trade in potable liquor. However, there is a fundamental right for the citizens referable to Article 21 of the Constitution of

India to enjoy peaceful dignified 'life' without any encroachment on their privacy to live life with sans public nuisance surrounding them. Thus, right to live a decent, undisturbed peaceful life is guaranteed under fundamental right under Article 21 of the Constitution while there is no right much less fundamental right to carry on trade in liquor. It is, however, most unfortunate to find out in the instant case that the Government which is supposed to take care of its citizens, ensure good health, ensure that they live peaceful and decent life, has placed the said fundamental right of the citizens guaranteed under Article 21 of the Constitution far below the so-called right of respondent no.4 to trade in potable liquor by opening a liquor bar at his restaurant in a purely residential area.”

In the same decision, it has further been observed :

“17. Right to life enshrined in Article 21 is not of mere survival or existence. It guarantees a right of persons to life with human dignity and that includes all the aspects of life which go to make a person's life meaningful, complete and worth living. It need not be told that the fundamental right of the citizens to live 'good life' must be placed above everything including the issue of grant of FL III licence.....”

The identical objection has been considered also by Division Bench of our High Court while considering the dispute as regards refusal of liquor licence in ***Hotel Shobha, through its Proprietor & anr. Versus Honble Minister & ors.*** reported in **2012 (6) Mh.L.J. 708**. It is observed therein, by placing reliance upon the decision of the Apex Court in ***Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Ors.*** reported in **AIR 1976 SC 578**, that writ of certiorari can be exercised at the

instance of members of public, neighbours in the vicinity of commercial establishments like theatre, hotel, etc. if activities therein cause nuisance or annoyance to them. It is only a rival trader or a person having interest or any motivated action which has been thrown out of the Court.

18. In view of the above, there can be no substance in the objection taken by respondent no.6 to the locus standi of the petitioner. Similarly, there can be no merit in the objection to maintainability of the petition on the ground of the revision application preferred by the petitioner before respondent no.2 not being maintainable. The challenge in the present petition is not restricted to the order passed by respondent no.2. The petitioner challenges the orders of respondent no.3 and respondent no.5, as well.

19. Mr. Patki, next seeks to contend that the present petition suffers from delay and laches. He points out that the licence for running the country liquor bar under the Act was issued to respondent no.6 as far back as in the year 1985. Respondent no.6 has been running the country liquor bar since then. Therefore the present petition filed in the year 2014 without explaining the delay cannot be maintained. On the aspect of delay in approaching the Court for exercise of its jurisdiction under Article 226 of the Constitution of India Mr. Patki relies upon the decision of the Apex Court in ***Shankara Co-op Housing***

Society Ltd. Versus M. Prabhakar & Ors. reported in ***(2011) 5 SCC page 607***. The observations relied upon by him are :

“54) The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:

(1) There is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners.

(3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay.”

The above considerations are in fact seen to have been satisfied by the facts and circumstances of the present case. The facts of the case show that shop nos.7 & 8 from where respondent no.6 had been running the country liquor bar was located in the outermost building of the chawl. On redevelopment of the chawl, the residential premises of all the tenants as well as the country liquor bar stand located in the same building. Thus, the country liquor bar has come in close proximity to the residential premises. The members of the petitioner started raising objections even before the actual allotment of shop no.32 to respondent no.6. Therefore, it cannot be said that there is any delay on the part of the petitioner. In any case, as has been held by the Division Bench in its decision in ***Hotel Shobha*** (supra), the cause of action in such cases is not such which could be said to have been lost or which cannot be said to be subsisting and continuing one and the writ petition cannot be thrown out on the ground of delay, particularly when it raises fundamental and important questions and has bearing on public interest.

20. This brings us to the merits of the petition. As noted hereinabove, the petitioner has raised following four grievances as regards grant of licence to respondent no.6:

- (i) There is mosque nearby and distance between the bar and mosque is less than what the statute requires,
- (ii) There is an educational institute nearby and the distance between the bar and the educational institute is less

than what the statute requires,

- (iii) There are two bus-stops nearby and the distance between the bar and the bus-stop is less than what the statute requires (this grievance was not raised in the earlier proceedings), and
- (iv) Nuisance is caused by the people who frequent the bar.

21. As per Rule 24(4b) and 24(4c) the distance between the bar and educational or religious institution must be 50 meters whereas the distance between the bar and any “bus-stand, station or depot of Maharashtra State Road Corporation” must be 100 meters. As already mentioned hereinabove the State Excise Department had taken measurements and drawn panchanama as regards the distances. The panchanama shows that the distance between the mosque and the bar is of 78.9 meters and the distance between the Municipal School and the bar is of 91 meters. These distances according to respondent no.6, as also the Excise Department are within the permissible limits. Mr. Patil submits that the petitioner has already raised objections to the panchanama. As regards the bus-stops, he points out that the map filed by the petitioner before respondent no.4 shows that the distance between the bus-stops and the bar is barely of 21 meters and 26.83 meters when the Rules require the distance to be of 100 meters. None of the respondents have disputed the distance between the two bus-stops and the bar.

22. In my considered opinion, the technical strict compliance of the Rules in the matters of such kind should not hold the Court from considering the true merit of the grievance raised by the petitioner. It will also be necessary to keep in mind the object behind the Rule for maintaining a certain distance. The object obviously is to avoid nuisance to a citizen. In any case as has been rightly pointed out by Mr. Patil, which fact cannot be disputed by the respondent, the Municipal school is located just across the compound wall of the petitioner Society. Therefore, the distance measured from midpoint of the nearest gate of the Municipal school and the midpoint of the entrance of the bar, along the nearest path by which a pedestrian ordinarily reaches, though satisfies the concerned Rule does not satisfy the object of the Rules. The photographs produced by the petitioner before the respondents as also before this Court clearly show the regular presence of the students near the bar, on their way to and fro the school.

23. This view is supported by the observations of the Division Bench in ***Hotel Shobha*** (supra). An identical argument advanced before the Division bench has been rejected with a much detailed discussion at para 23 and 29 thereof, which reads as under:

“23. We are not in agreement with Mr. Samarth that the distance factor, namely, 75 metres or 100 metres from the schools, religious structures/temples, hospitals etc. should have been taken into consideration and if no such

structures are there within the vicinity of the appellants establishment, then, the licence could not have been rejected. Here, emphasis is not on distance from such establishments and structures which is of course an mandatory requirement. Apart therefrom, in the facts and circumstances of the present case, the foundation of the orders passed by the Collector and the Commissioner is that there is serious objection from the residents and there are complaints made from time to time which highlighted the issue of public nuisance, inconvenience to the residents, embarrassment to women and school and college going children. The situation being unsafe and specially during late evening and late night hours, the scenario where a person in drunken condition and inebriated state coming out of the establishment in case a licence is granted, is a matter equally of concern. It is certainly germane and relevant consideration for grant of licences and particularly to serve liquor and intoxicants in an establishment which is set up for purely commercial gains. If right to trade in intoxicant is not a fundamental right, then, the complaints from local residents, adverse police reports and opposition from the local representative of people, so also, statutory authorities, can be taken into account to deny the licence in individual cases and to such applicants and establishments who can be potential cause of harassment, nuisance and annoyance to the residents. If public interest and public good is dominant and paramount consideration, then, all such activities have to be regulated, controlled, checked and even prohibited and that can be done by the State. There is no unrestricted and absolute right in anybody and particularly of selling liquor and intoxicants. If public health, public nuisance and public interest are not germane considerations and relevant factors, then, we fail to understand what can be the guiding tests for the authorities in considering the application of the nature made by the appellant before us. In such cases where

there is wide opposition and that is not found to be at the behest of any vested interest or rival traders or on account of personal or pure enmity, then, that cannot be ignored or brushed aside...

29.If it is the distance and that alone is a relevant factor, then, nobody including a Hospital or Medical Practitioners can complain about a liquor Bar, Beer Bar, Restaurant, etc. serving food and liquor and causing nuisance to patients and those who are ailing and suffering, if the nursing homes and hospitals are located in close vicinity, but beyond 75 or 100 metres. Such activities can cause nuisance, annoyance, hindrance and equally breach of peace and tranquility even if they are within a permitted location. The location and distance is certainly a mandatory condition which must be complied with. It is but one of the required and guiding factor and by no stretch of imagination can it be said to be conclusive and decisive. If establishment of the nature of appellant is located beyond specified and required distance, yet, if it is a cause for public nuisance and adversely affects peace and tranquility of those residing within its vicinity and nearby areas, then, such activity has to be regulated and controlled or even prohibited. Going by distance criteria alone would be hazardous, risky and not conducive to public interest....

24. As regards the bus-stops, the defence of respondent no.6 is that Rule 24(4c) which deals with distance restrictions does not apply to bus-stops and it applies only to bus-stand, station or depot of Maharashtra State Road Corporation. Respondent no.4 has accepted this argument of respondent no.6. Conjoint reading of Rule 24(4c) quoted above and explanation (iii)(b), in my opinion, supports the submission of Mr. Patki. The explanation

(iii)(b) of Rule 24(4) requires measurements to be taken from the midpoint of the nearest gate of bus stand or bus station or bus depot and in the absence of a compound wall from the nearest point of the boundary thereof. A bus-stop would always be on a public road and would not have either a compound wall or a boundary.

25. The last ground of the petitioner is of nuisance caused to its members on account of running of a country liquor bar in the residential building. Undoubtedly there is sufficient material on record to support this grievance of the petitioner. There have been various complaints made to the various authorities along with the photographs. The complaints state the details of the incidents of nuisance and harassment which need not be dilated at this place. It is sufficient to note that the allegations of nuisance and harassment are serious enough.

26. Mr. Patki submits that there are alternate remedies available to the petitioner for redressal of grievance of its members of nuisance. He refers to Section 85 of the Act which makes an act of being drunk and disorderly behaviour, on any street or thoroughfare or public place or any place to which the public have an access, an offence. According to him, it is open for the petitioner to complain to the police if any of the customers of respondent no.6 are found guilty of the act alleged under Section 85. This provision pointed out by Mr. Patki can hardly be an

alternative remedy available to the petitioner for stopping the activity of running the country liquor bar from the building of the petitioner Society.

27. The second alternate remedy referred to by Mr. Patki is provided under Bombay Prohibition (Closure of Licence on Resolution by the Village Panchayat or the Gram Sabha or women/Social Organisation or representation by Voters in the village or ward of Municipal Council/Corporation) Order, 2003. He submits that a complaint can be made by the local residents about the licence issued under the Act to the authorities. The identical argument is seen to have been rejected by the Division Bench in its decision in **Hotel Shobha** (supra) with an observation that :

“40..... That is but one more opportunity for aggrieved parties like original Writ Petitioners to raise their grievance and make complaints, but existence of that does not prevent them from opposing grant of licence to the establishments like the Appellant as that is the underlying theme of the law of prohibition in the State. Even grant of authorisation and licence for manufacturing and sale of the intoxicant can be opposed and precisely that is the reason why the complaints were entertained by the Police, Collector and Commissioner. The Writ Petition, therefore, could not have been dismissed on the ground of alternate remedy.”

28. Mr. Patil submits that the efficacy of such remedies can be tested by the action taken by respondent nos.1 to 5 on the complaints made by the petitioner. One of the grievances made by

the petitioner in its complaints was that respondent no.6 was not following the Rules as regards the opening and closing of the bar. Respondent no.6 used to open the bar early in the morning. The Authorities took action only in respect of that grievance by imposing fine of Rs.30,000/- upon respondent no.6 for violation of the hours of the bar. This action does not redress the grievance of the petitioner of nuisance during the time the bar is run in accordance with the Rules.

29. Last and but not the least is the argument advanced by the petitioner based on Article 21 and 47 of the Constitution of India. The complaint of nuisance made by the petitioner at the instance of its members is a complaint from public and the public voice cannot be ignored by the welfare state. As a part of the welfare state the Government must take into account the sentiments of public in such matters. The public interest cannot be evaluated by looking at it departmentwise with mechanical application of the Rules framed. The Division Bench in ***Hotel Shobha*** case (supra) has extensively considered this aspect also with an observation that the liquor licence may generate revenue and may give tremendous income to the State. However the State cannot ignore that all discretion and power including to issue licences is coupled with a duty. The Authority while exercising the discretionary power must bear in mind public interest and public good. The relevant observations of the Division Bench at paras 36, and 37 read as under:

“36. The scheme of sections and orders in which they appear in the statute makes it clear that the underlying policy of the State by enacting the Act is to fulfill and perform, so also, act in furtherance of the directive principles referred to in Article 47 of the Constitution of India. Therefore, the learned Single Judge was in no error and we do not agree with Mr. Samarth and the learned AGP that the learned Single Judge was not required to emphasize or has laid undue emphasis on the directive principles of State Policy and particularly dealing with prohibition. In a recent judgment of the Honourable Supreme Court, reported in A.I.R. 2006 S.C. 1987 (State of Maharashtra Vs. Nagpur Distillers), it has been held thus:

“9. This factual distinction apart, we have to keep in mind that the right to trade in liquor is only a privilege farmed out by the State. Article 47 of the Constitution of India clearly casts a duty on the State at least to reduce the consumption of liquor in the State gradually leading to prohibition itself. It appears to be right to point out that the time has come for the States and the Union Government to seriously think of taking steps to achieve the goal set by Article 47 of the Constitution of India. It is a notorious fact, of which we can take judicial notice, that more and more of the younger generation in this country is getting addicted to liquor. It has not only become a fashion to consume it but it has also become an obsession with very many. Surely, we do not need an indolent nation. Why the State in the face of Article 47 of the Constitution of India should encourage, that too practically unrestrictedly, the trade in liquor is something that it is difficult to appreciate. The only excuse for the State for not following the mandate of Article 47 of the Constitution is that huge revenue is generated by this trade and such revenue is being used for meeting the financial needs of the State. What is more relevant here is to notice that the monopoly in the trade is

with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending liquor.”

37. In a judgment reported in A.I.R. 1951 S.C. 318 (The State of Bombay and another Vs. F.N. Balsara), the Supreme Court held thus:

“17. There is in my opinion another method of approaching the question which also deserves consideration. Remembering that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit use, consumption, possession and sale of intoxicating liquor, the legislature had the power to legislate upon the subjects included in the Act not only under entry 31 of List II, but also under entry 14, which refers inter alia to public health. Article 47 of the Constitution, which contains one of the directive principles of State policy, provides that:

“The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties & in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks & of drugs which are injurious to health.”

This Article has no direct bearing on the Act which was passed in 1949, but a reference to it supports to some extent the conclusion that the idea of prohibition is connected with public health, & to enforce prohibition effectively the wider definition of the word “liquor” would have to be adopted so as to include all alcoholic liquids which may be used as substitutes for intoxicating drinks, to the detriment of health. On the whole, I am unable to agree with the High Court's finding, & hold that the definition of “liquor” in the Bombay Prohibition Act is not 'ultra vires'.

18. *The learned Attorney General also relied upon Entry 1 of List II which relates among other items to “public order”, & though at first sight it may appear to be far-fetched to bring the subject of intoxicating liquor under public order, yet it should be noted that there has been a tendency in Europe and America to regard alcoholism as a menace to public order. In Russel Vs. The Queen, 1882(7) A.C. 829, Sir Montague Smith held that the Canada Temperance Act, 1878, the object and scope of which was to promote temperance by means of a uniform law throughout the Dominion, was a law relating to the “peace, order, and good Government” of Canada, and, in so deciding, said as follows:*

“Laws of this nature designed for the promotion of public order, safety, or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which falls within the general authority of Parliament to make laws for the order and good government of Canada.” (P. 839)

Again, referring to liquor laws and liquor control, a learned British author (The Encyclopaedia Britannica, Edn. 14, Vol.14, p.191) says as follows:

“The dominant motive everywhere, however, has been a social one, to combat a menace to public order and the increasing evils of alcoholism in the interests of health and social welfare. The evils vary greatly from one country to another according to differences in climate, diet, economic conditions and even within the same country according to differences in habits, social customs and standards of public morality. A new factor of growing importance since the middle of the 19th century has been the rapid urbanisation, industrialization and mechanization of our modern every day life in the leading nations of the world, and the consequent wider

recognition of the advantages of sobriety in safeguarding public order and physical efficiency.”

These passages may lend some support to the contention of the learned Attorney General that the Act comes also within the subject of “public order”, but I prefer to leave out of account this entry, which has a remote bearing, if any, on the object and scope of the present Act.”

The above observations of the Honble Supreme Court have been made while construing the Act of the Maharashtra State, namely, the Bombay Prohibition Act, 1949, but they seem to have no impact and the State is still not abiding by the same. Judicial Notice has been taken of Alcoholism and its menace to the society especially women, youth and children.”

30. Returning to the facts of the present case, the contents of the complaints filed by the petitioner with the authorities establish the nuisance and harassment experienced by the members of the petitioner on account of the country liquor bar. The complaints are varied in nature. The customers of respondent No.6 often quarrel and fight with each other after consumption of liquor, causing disturbance for everybody, the customers in intoxicated state make indecent proposals to the ladies residing in the building, the country liquor bar attracts the prostitutes and pimps, one of the customers was found partly naked and urinating in the compound. There was an incident of a customer of respondent No.6 misbehaving with a resident of the petitioner Society. A complaint in respect thereof has been filed with Dr.

D.B. Marg Police Station vide Cr. No.43 of 2015 for the offence punishable under Section 354A IPC against that customer. The people in the surrounding locality have also supported the petitioner in its struggle. Lokhandwala Welfare Committee formed by the residents Bapty Road who feel harassed by the activities of respondent No.6, adjoining Kalyan Building Welfare Association, Murga Gram Mosque Trust and Murga Giran Co-operative Society are some of the supporters. As already seen above, in such circumstances, the technical compliance of the distances to be maintained from the religious and educational institutions become insignificant. What is most significant and important is the protection of fundamental rights to life under Article 21 of the Constitution of India, which includes a meaningful, dignified, and peaceful life. What is also correspondingly important is observance by the State of the directive principle stated at Article 47 of the Constitution of India. For these reasons, the petition deserves to be allowed. Hence the following order:

ORDER

- (i) The petition is allowed in terms of prayers (a) and (b).
- (ii) At the request of Mr.Yogesh Patki, the learned for Respondent no.6, the order is stayed for a period of eight weeks from today.

(Smt. R.P. SondurBaldota, J)