

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9537 OF 2016

Ashok Sevakram Gangwani ... Petitioner
Vs.
The State of Maharashtra and others ... Respondents

Mr. A. V. Anturkar, Senior Advocate a/w. Mr. Tanaji Mhatugade a/w.
Mr. Ranbir Shinde for Petitioner.
Mr. S. D. Rayrikar, AGP for Respondents No.1 to 3.
Ms Veena Thadani for Respondents No.4 and 5.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 27, 2018

P.C. :

Heard Mr. Anturkar, learned Senior Counsel for the petitioner,
Mr. Rayrikar, learned AGP for respondents No.1 to 3 and Ms Thadani,
learned Counsel for respondents No.4 and 5 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 17.10.2015 passed by the Hon'ble Minister of State Excise in Revision No.FLR 1215/RA-23/EXC-2. By that order, the Hon'ble Minister has allowed the Revision Application filed by respondents No.4 and 5 herein and set aside the order dated 30.06.2015 passed by the Commissioner of State Excise, Maharashtra State, Mumbai. The Hon'ble Minister has rejected the Revision Application filed by the petitioner and allowed the Revision Application of respondents No.4 and 5. The Hon'ble Minister has restored the licence in favour of the respondent No.5 herein after observing that the name of the 5th respondent was added as a partner in the partnership comprising of respondent No.4 and his father-Premji Shah. On that basis, FL-II licence was transferred in favour of the respondent No.5.

3. In support of this Petition, Mr. Anturkar strenuously contended that while passing the order on 30.06.2015, the Commissioner held that original licensees - respondent No.4 and his father, Premji Shah had committed breach of the provisions of the Maharashtra Prohibition Act (for short 'Act') and the Rules made thereunder. They also committed breach of irrevocable General Power of Attorney granted by them. The Commissioner, therefore, held that FL-II licence issued in their favour is liable to be cancelled under Section 54(1)(c) of the Act for breach of rules and licence conditions. The Commissioner directed the Collector to cancel the licence permanently, operating in the name and style of "Vasai Wines" in Thane District (now Palghar District) with immediate effect. Mr. Anturkar submitted that while passing the impugned order, the Hon'ble Minister has not considered this finding. The Hon'ble Minister has not considered whether the original licensees, namely, respondent No.4 and his father committed breach of the provisions of the Act and the Rules made thereunder and in view thereof, whether the licence is liable to be cancelled.

4. Mr. Anturkar submitted that the modus operandi followed in the present case is to induct a partner in a partnership firm and the original licensees, who are partners in the firm thereafter retire, which amounts to transfer of licence contrary to the provisions of Rule 40 of the Bombay Foreign Liquor Rules, 1953 (for short 'Rules').

5. Mr. Anturkar invited my attention to Sections 54(1)(c) and 138 of the Act. He submitted that in the impugned order, the Hon'ble Minister observed that respondent No.5 was inducted as a partner on 25.07.2006 having 90% share in the partnership. The original licensees, respondent No.4 and his father retired from the partnership and on 09.10.2006, licence was transferred in favour of the 5th respondent. He submitted that

this is clearly back-door method for transferring the licence.

6. Mr. Anturkar invited my attention to the affidavit of respondent No.4, his father - Premji Shah and respondent No.5. Originally, the affidavit was purportedly executed on 3rd April, 2006. The month 'April' was struck out and in its place, month 'July' was written. The affidavit is made before the Executive Magistrate, Ulhasnagar on 03.07.2006. He also invited my attention to another affidavit of ____ day of April 2006 made by these persons whereunder the names of the respondent No.4 and his father were stated to be deleted from the licence and the licence would be transferred in favour of the respondent No.5. The said affidavit is made before the Executive Magistrate, Ulhasnagar on 10.08.2006.

7. Mr. Anturkar invited my attention to Rule 40(1) and (1-A) of the Rules. In particular, Rule 40(1-A) lays down that except with previous sanction of the Collector, no person recognized as partner under sub-rule(1) is allowed to withdraw from the partnership and to have his name as partner deleted from the licence. In the instant case, without previous sanction of the Collector, respondent No.4 and his father retired from the partnership after respondent No.5 was added as a partner on 25.07.2006. On 09.10.2006, licence was transferred in favour of respondent No.5. Thus, this in effect amounts to breach of Rule 40(1-A) of the Rules.

8. Mr. Anturkar submitted that petitioner was carrying on business on basis of irrevocable General Power of Attorney dated 27.01.2005 executed by the respondent No.4 and his father in his favour. During the validity of this Power of Attorney, respondent No.4 and his father admitted respondent No.5 as a partner on 25.07.2006 and eventually, the licence was transferred in favour of respondent No.5 on 09.10.2006 that

is to say during the subsistence of the Power of Attorney. He, therefore, submitted that the impugned order deserves to be set aside and the Petition requires consideration.

9. On the other hand, Ms Thadani supported the impugned order. She submitted that petitioner is admittedly claiming rights on the basis of Power of Attorney dated 27.01.2005 as also conducting agreement dated 20.04.2004 executed by respondent No.4 and his father in favour of the petitioner. The said conducting agreement was for a period of 5 years commencing from 20.04.2004. She submitted that on the basis of the conducting agreement and irrevocable General Power of Attorney, petitioner cannot claim any interest in the licence. She relied upon the following decisions:

- a. ***Pratap Balkrishna Kedari Vs. Premadevi Laxminarayan Agarwal***, AIR 2002 Bombay 319, and in particular paragraphs 8 to 11 thereof;
- b. ***Raghunath Khandelwal Vs. Collector of Pune and 4 others***, Writ Petition No.3699 of 1997 decided on 05.10.1998 by this Court [Coram: A.P.Shah J. (as the learned Chief Justice then was)], and in particular paragraphs 5 and 9 thereof. In paragraph 9, the learned Single Judge observed that an agreement and / or arrangement for carrying on business on the strength of power of attorney is illegal and void ab initio in view of the bar created under the rules as well as conditions of the licence.

10. Ms Thadani further submitted that respondent No.5 was added as a partner on 25.07.2006. Subsequently, the licence was transferred in his name on 09.10.2006. Addition of respondent No.5 in the partnership as also transfer of licence in his favour on 09.10.2006 was challenged before the Hon'ble Minister. By order dated 26.06.2014, the Hon'ble

Minister directed the petitioner herein to file proceedings before the Commissioner, State Excise. In pursuance thereof, the petitioner filed appeal under Section 137(2) of the Act before the Commissioner. She submitted that though this appeal was against the addition of the 5th respondent on 25.07.2006 and deletion of respondent No.4 and his father from the licence on 09.10.2006, the Commissioner cancelled the licence permanently when that was not the subject matter of the appeal. She, therefore, submitted that as the petitioner has no right in the licence, no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the petitioner is claiming the right to carry on business on the basis of the conducting agreement dated 20.04.2004, which was for a period of 5 years commencing from 20.04.2004 and irrevocable General Power of Attorney dated 27.01.2005. Rule 40(2)(a) of the Rules lays down that subject to the provisions of clause (b), a holder of a vendor's licence shall carry on his business under the licence either personally or by an agent or servant duly authorized by him in this behalf by a written *nokarnama* in Form F.L.XIV, signed by himself and countersigned by a Prohibition and Excise Officer not lower in rank than a Sub-Inspector. Form F.L.XIV requires licensee to authorize the servant / agent named and appointed for a period mentioned in the margin to officiate on behalf of the licensee in respect of the functions, that is to say, namely, (a) to officiate for him at his licensed premises / shop and (b) to transfer foreign liquor. It is, therefore, not possible to accept submission of Mr. Anturkar that no authorization in Form F.L.XIV is required to carry on the business under the licence either personally or by an agent.

12. In the present case, petitioner has not shown that either the conducting agreement or irrevocable General Power of Attorney was countersigned by the Prohibition and Excise Officer. In the case of **Pratap Balkrishna Kedari** (*supra*), it was observed in paragraph 9 thus,

“9. On plain reading of this provision, it would appear that it mandates that the licensee shall carry on the business of the shop either personally or by his agent or servant duly authorised by him in this behalf by written Nokarnama in prescribed form signed by himself and countersigned by the specified officer. No doubt, this provision refers to the expression "agent". An agent would be one who is authorised by the licensee to act for or in place of him. In the context of the scheme of the extent rules relating to liquor licence we will have to hold that such person can have no independent right in the licence, for if we were to hold to the contrary it would tantamount to legitimating the transfer of rights under the licence to such third person. The expression "agent" occurring in this provision will have to be given a limited meaning. This view is reinforced by the stipulations under form CL VII which is to be signed by the licensee as well as to be countersigned by the specified authority only when such person can claim to be the agent of the licensee so as to become entitled to do the business. The prescribed form clearly provides that the person who actually conducts the business on behalf of the licensee has no independent right in the said business but is doing so entirely on instructions and at the pleasure of the licensee. In other words, so long as the licensee permits such a person to conduct the business only till such time he can continue to do the business.”

13. In the said decision, this Court has clearly held that either agent or servant has no independent right to carry on business and he carries on business under the instructions of the licensee. The expression “agent” occurring in the provision has to be given a limited meaning. This Court further held that the prescribed form clearly provides that the person who actually conducts the business on behalf of the licensee has no independent right in the said business but he is doing so entirely on instructions and at the pleasure of the licensee. In other words, so long

as the licensee permits such a person to conduct the business only till such time, he can continue to do the business. In the case of **Raghunath Khandelwal** (*supra*), in paragraph 9, it was observed that respondent No.4 was claiming right on the basis of irrevocable General Power of Attorney. It is in that context, it was observed that such agreement and / or arrangement for carrying on business on the strength of power of attorney is illegal and void ab initio in view of the bar created under the rules as well as conditions of the licence. In view thereof, it has to be concluded that the petitioner cannot claim any right to carry on any business on the strength of conducting agreement and irrevocable General Power of Attorney. That apart, respondent No.5 was added as a partner on 25.07.2006 and also his name was added in FL-II licence. Subsequently, the licence was transferred in favour of the 5th respondent on 09.10.2006. In view thereof, I do not find that the Hon'ble Minister committed any error in passing the impugned order. As the petitioner has not established any right to carry on business on the strength of conducting agreement and irrevocable General Power of Attorney, this is not a fit case for exercising writ jurisdiction under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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