

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9748 OF 2019

Versova Vinayak Co-operative Housing Soc. Ltd. ... Petitioner
Vs.
State of Maharashtra and others ... Respondents

WITH

WRIT PETITION NO.12564 OF 2019

St. Mary's High School ... Petitioner
Vs.
State of Maharashtra and others ... Respondents

Mr. Vyom Shah a/w. Uzair Z. Kazi, Joshua D'souza and Mayank Ostwal
i/b. Yogendra M. Kanchan for Petitioner in W.P.No.9748 of 2019.
Mr. K.T. Thomas a/w. Biju Chittilapilly, Mayank Mishra and Ms Nikita
Trivedi for Petitioner in W.P. No.12564 of 2019.
Ms Veena Thadani for Respondent No.2 in W.P.No.9748 of 2019 and for
Respondent No.4 in W.P. No.12564 of 2019.
Mr. N. C. Walimbe, AGP for Respondent No.1 in W.P.No.9748 of 2019.
Mr.S.L.Babar, AGP for Respondent Nos.1 to 3 in W.P.No.12564 of 2019.
Mr. R. S. Ghadge i/b. Mr. S. S. Raktate for Respondent No.3 in
W.P.No.9748 of 2019.

CORAM : UJJAL BHUYAN, J.
DATE : DECEMBER 12, 2019

P.C. :

This order will dispose of both the writ petitions i.e. Writ Petition
Nos.9748 of 2019 and 12564 of 2019.

2. Heard Mr. Shah, learned counsel for the petitioner in W.P.
No.9748 of 2019; Mr. Thomas, learned counsel for the petitioner in
W.P.No.12564 of 2019; Ms Thadani, learned counsel for respondent
No.2 in W.P.No.9748 of 2019 and for respondent No.4 in W.P.No.12564
of 2019; also heard Mr. Walimbe, learned AGP for respondent No.1 in
W.P.No.9748 of 2019; Mr. Babar, learned AGP for respondent Nos.1 to 3
in W.P.No.12564 of 2019; and Mr. Ghadge, learned counsel for
respondent No.3 in W.P.No.9748 of 2019.

3. In Writ Petition No.9748 of 2019, Versova Vinayak Co-operative Housing Society Limited is the petitioner whereas in Writ Petition No.12564 of 2019, St. Mary's High School is the petitioner. In both the writ petitions, order passed by learned Excise Minister, Maharashtra dated 29.07.2019 exercising power of revision is under challenge.

4. The dispute relates to operation of a liquor shop by the name and style of "M/s. Kara Wines" by respondent No.2 in the premises of respondent No.3, the landlord in the ground floor of the building of the petitioner in Writ Petition No.9748 of 2019.

5. Respondent No.3 i.e., the landlord had lodged a complaint before the Collector complaining that the rental agreement with respondent No.2 had expired. He also made allegations of breach of licence conditions by respondent No.2 besides causing of nuisance in the locality because of the presence of the liquor shop.

6. After hearing the matter, Collector passed an order dated 17.10.2017 directing respondent No.2 to shift the liquor shop from the aforesaid rented premises of respondent No.3 and in the meanwhile, suspended his liquor licence.

7. Aggrieved by the aforesaid order dated 17.10.2017, respondent No.2 preferred appeal before the Commissioner of State Excise, Maharashtra who by his order dated 23.03.2018 declined to interfere with the order dated 17.10.2017 and dismissed the appeal.

8. This order of the Commissioner dated 23.03.2018 was assailed by respondent No.2 by filing revision application under Section 138 of the Maharashtra Prohibition Act, 1949. Hon'ble Minister of Excise, Maharashtra as the Revisional Authority heard the matter and by order dated 29.07.2019 allowed the revision application by setting aside the orders passed by the Commissioner as well as by the Collector, besides

permitting respondent No.2 to continue to operate the liquor shop in the place in question.

9. It is this order which is under challenge in the two writ proceedings.

Writ Petition No.9748 of 2019

10. Respondent No.2 has filed affidavit in reply so also respondent No.3. Petitioner has filed rejoinder affidavit to the reply affidavit of respondent No.2.

11. While assailing the order passed by the revisional authority, learned counsel for the petitioner has placed reliance on the decisions passed by the Collector as well as by the Commissioner in appeal and submits that there was no justification for interference at the stage of revision. Besides it is contended that the liquor shop of respondent No.2 is within 50 meters distance of an educational institution which is the petitioner in the second writ petition and therefore, there is violation of Rule 25 of the Bombay Foreign Liquor Rules, 1953.

11.1. Learned counsel for the petitioner contends that petitioner was one of the complainants before the Collector but he was not made a party in the revision application and without hearing the petitioner, impugned order was passed in revision.

11.2. Learned counsel for respondent No.3 supports the submissions of learned counsel for the petitioner.

12. On the other hand, learned counsel for respondent No.2 as well as learned AGP have supported the order passed in revision and contends that no interference is called for.

13. Submissions made by learned counsel for the parties have been

considered; also perused the materials on record.

14. Relating to the tenancy dispute between respondent No.2 and respondent No.3, it is seen that respondent No.2 as the plaintiff has instituted L.D.Suit No.110 of 2011 in the Court of Small Causes at Mumbai (Bandra Branch). In the said Suit, an application was filed by respondent No.2 for temporary injunction to restrain the defendants which included respondent No.3 from disturbing the business of the plaintiff and from dispossessing him from the suit premises. This application was marked as exhibit No.9. By order dated 29.01.2013 below exhibit No.9, learned Court below discussed the tenancy dispute for the purpose of the injunction application in the following terms:

“21. As regard, plea raised by defendant No.1 that leave and licence agreement is already expired on 30/04/2012. Therefore, occupation of the plaintiff now is illegal. However, whether the leave and licence agreement is expired and whether the possession of the plaintiff is now illegal or not will be decided at the time of final hearing on adducing evidence by the parties. Here the admitted fact is that plaintiff has been inducted in the suit premises on the basis of leave and licence agreement dtd.27/05/2011. As such, possession of the plaintiff is permissive. Also at present plaintiff is in possession. While deciding the application for injunction only, it is to be seen as to who is in actual possession. It is admitted fact that plaintiff is in actual possession. Therefore, plaintiff is having prima facie and balance of convenience lies in his favour. Under such situation, if the temporary injunction is not granted plaintiff would suffer irreparable loss.”

15. In such circumstances, learned Court below allowed the injunction application and restrained the defendants including respondent No.3 from disturbing the business of the plaintiff i.e., respondent No.2 in the suit premises or to dispossess the plaintiff i.e., respondent No.2 from the suit premises without following due process of law till disposal of the suit.

16. The revisional authority in his order dated 29.07.2019 after hearing the parties came to the following conclusion:

“9. Conclusion of the revisional authority is as under:

“CONCLUSION: - From the document submitted by the Revision Applicant and the arguments advanced at the time of personal hearing by the concerned persons, it is seen that the Applicant was allowed to shift his licensed premises to the present premises in the year 2002. At that time the said Licence was free from distance regulations. The Revision Applicant has submitted that time the rear gate of the Society was closed. However, now the Society has deliberately opened the said gate and has filed a complaint that the licensed premises are not free from distance regulations. Hence, the conclusion drawn by the Collector that the premises are not free from distance regulations from that gate is not proper because the said gate has been opened after the Licence has been shifted there. According to the Rules for shifting of licences, if any change takes place in the said area after a licence has been granted, the distance regulations would not be applicable with retrospective effect. Hence, it will not be proper to measure the distance through the said gate and will not be in accordance with the Rules. Furthermore, Suit No.110/2011 is pending in the Hon’ble Small Causes Court with regard to the said licensed premises and till such time as a final decision is taken in the said Suit, the Hon’ble Court has ordered that there will be no obstruction for the business being carried on in the said premises. Furthermore in the said matter, his Advocate has, by letter dated 04/06/2019 informed that no final Orders have been passed as yet. Considering all the above facts, I’m passing the following Order in accordance with the powers vested in me by Section 138 of the Maharashtra Prohibition Act, 1949.”

17. From the above it is seen that the revisional authority had taken note of the fact that respondent No.2 was allowed to shift his licensed premises to the present premises in the year 2002. There were no distance regulations at that point of time. Since the distance regulations have come into force subsequently, he has taken the view that it would not be proper to measure the distance at this stage. That apart, he has also taken note of pendency of the suit before the Court below and the injunction granted therein. In such circumstances, the revisional authority set aside both the orders below allowing respondent No.2 to

continue his business subject to outcome of the civil suit.

18. From the tone and tenure of the proceedings, Court is of the view that it is basically a tenancy dispute between respondent No.2 and respondent No.3 which has triggered filing of complaint by respondent No.3 before the Collector. It appears that it is the tenancy dispute which is at the root of the complaint against respondent No.2. In such circumstances, Court is not inclined to interfere with the revisional order passed by the Hon'ble Minister.

Writ Petition No.12564 of 2019

19. That brings us to the second writ petition i.e. Writ Petition No.12564 of 2019 which is filed by St. Mary's High School as the petitioner. Primary contention of the petitioner in this case is that the liquor shop of respondent No.2 (in this case respondent No.4) is within 50 meters of the school which is in violation of Rule 25(2)(b) of the Bombay Foreign Liquor Rules, 1953. In this connection, petitioner submitted complaint dated 20.10.2011 before the District Collector for removal of the liquor shop from the said area on the aforesaid ground. This was followed by subsequent complaint dated 06.10.2017 lodged by the Principal of the School before Superintendent of Excise. Petitioner has contended that as per measurement carried out by Superintendent of Excise, distance between the main gate of the school and the liquor shop has been found to be 43.3 meters which is less than the minimum statutory distance. But without considering such materials, Hon'ble Minister acting as the revisional authority passed the order dated 29.07.2019. It is also contended that petitioner was not heard by the Hon'ble Minister while passing such order.

20. Learned counsel for respondent No.4 however submits that initially the distance between the liquor shop and that of the school was more than 50 mtrs. The liquor shop is carrying on business in the present

premises since the year 2002 whereas petitioner lodged complaint after 9 years in the year 2011. Complaint is motivated.

21. A perusal of Rule 25 of the Bombay Foreign Liquor Rules, 1953 would go to show that it deals with grant of vendor's licence and payment of fees. While sub-rule (1) empowers the Collector to grant such licence, sub-rule (2) provides for two situations in which event licence under sub-rule (1) should not be granted. As per situation (b), if the proposed liquor shop situated within the jurisdiction of any Municipal Corporation or 'A' Class or 'B' Class Municipal Council is within a distance of 50 meters and if situated elsewhere within a distance of 100 meters from any educational or religious institution.

22. Learned counsel for the petitioner relied upon a decision of the Supreme Court in *Vikrama Shama Shetty Vs. State of Maharashtra*, **(2006) 6 SCC 70** and submits that such distance has to be strictly construed.

23. In the said case, the revisional authority had declined to grant licence on the ground that the distance between the liquor shop and the entrance to the religious place was less than the statutory requirement. When this was put to challenge, High Court had appointed a Court Commissioner and as per report of the Court Commissioner, the distance between the two was found to be less than the statutory requirement. Therefore, High Court did not interfere with the matter. In the facts and circumstances of that case, Supreme Court also declined to interfere with the order passed by the High Court.

24. Since the petitioner before the Court is an educational institution, that too imparting education to girl students, Court is of the view that complaint made by the petitioner regarding the distance between the petitioner and the liquor shop of respondent No.4 is required to be looked into by the concerned authorities so as to ensure that there is no

infraction of Rule 25(2)(b) of the Bombay Foreign Liquor Rules, 1953.

25. Accordingly, Court is of the view that District Collector, Mumbai Suburban should carry out the exercise regarding the distance between the school and the liquor shop of respondent No.4 and after giving due opportunity of hearing to the petitioner and respondent No.4, he shall pass appropriate order in accordance with law within a period of 3 months from the date of receipt of an authenticated copy of this order. No opinion is expressed on merit and all contentions are kept open.

26. In the circumstances, while Writ Petition No.9748 of 2019 is dismissed, Writ Petition No.12564 of 2019 is allowed to the extent indicated above.

(UJJAL BHUYAN, J.)

Minal Parab