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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3765 OF 2018

Shankar Rajaram Gaud
Age – 56 years, Occ – Business,
R/o Om Nivara Complex, Kopargaon,
Taluka – Kopargaon, District – Ahmednagar
At present residing at Zari
Taluka and District – Parbhani

PETITIONER

VERSUS

1. Hitendra Vinayakrao Upadhyay
Age – 59 years, Occ – Agriculture
R/o 'Anukrupa' Sahakar Nagar
Old Pedgaon Road, Parbhani
Taluka and District – Parbhani
2. Manish Vinayakrao Upadhyay
Age – 52 years, Occ – Business
R/o As above
3. Vinayakrao Narmadashankar Upadhyay
Age – 89 years, Occ – Business
R/o As above

RESPONDENTS

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Mr. Anil H. Kasliwal, Advocate for the petitioner
Mr. V. D. Hon, Senior Advocate i/b Mr. R. K. Ashtekar, Advocate
for respondents No.2 and 3

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WITH
SECOND APPEAL NO.917 OF 2022

Shankar Rajaram Gaud
Age – 60 years, Occ – Business,
R/o Om Nivara Complex, Kopargaon,
Taluka – Kopargaon, District – Ahmednagar
At present residing at Zari
Taluka and District – Parbhani

APPELLANT

VERSUS

Respondents No.1 to 3 are
R/o 'Anukrupa' Sahakar Nagar
Old Pedgaon Road, Parbhani
Taluka and District – Parbhani

Mr. Anil H. Kasliwal, Advocate for the appellant
Mr. V. D. Hon, Senior Advocate i/b Mr. R. K. Ashtekar, Advocate
for respondents No.2 and 3

DATE : 24th JULY, 2023

1. The petitioner is aggrieved by the order dated 3rd March, 2018 passed by learned Joint Civil Judge (Senior Division), Parbhani below Exhibit-16 in Regular Civil Suit No. 249 of 2017, thereby partly allowing the application filed by the petitioner under Order 7, Rule 11 (d) of the Civil Procedure Code.
2. The respondents – original plaintiffs filed Regular Civil Suit No. 249 of 2017 against the petitioner – defendant claiming following reliefs :

“1. Declaration to the effect that, country liquor license No. CL-III-13

situated at Zari, Tq & Dist.Parbhani transferred in the name of defendant on daetd 22/06/2015 is illegal, ultra-virus and not binding on the rights of the plaintiffs, same is required to be cancelled.

2. *Issue mandatory injunction directing the defendant to make necessary application to the Collector, Parbhani for transfer of country liquor license bearing No. CL-III-13 situated at Zari, Tq & Dist Parbhani in the name of plaintiffs.*
3. *Issue perpetual injunction restraining defendant from carrying business under CL-III license No.13 pending the hearing and final disposal of the suit.*
4. *Issue mandatory injunction directing the defendant to deposit entire earning under above said license in the Hon'ble Court.*
5. *Issue perpetual injunction restraining defendant from transferring disputed license in the name of third party or from creating third party interest in the disputed license described more particularly in Claim Clause No.1.”*

3. Temporary injunction application filed by the plaintiffs in the suit was rejected by the Trial Court, however, the Appellate Court has granted the relief of temporary injunction to the effect that the defendant – petitioner is restrained from transferring the license in question to third party.

4. The defendant filed application Exhibit-16 in the said Suit challenging jurisdiction of the Trial Court, on the ground that there is express bar under section 146 of the Maharashtra

Prohibition Act and, therefore, jurisdiction of the civil court is barred. The application was opposed by the plaintiffs, by filing say. The Trial Court, by a detail order, partly allowed the application, thereby dismissing the suit in respect of relief under claim No.1 for want of jurisdiction and directed the suit to proceed further in respect of other reliefs claimed by the plaintiffs. The defendant – petitioner is aggrieved by this order.

5. During pendency of the present petition, the order impugned in the present petition was challenged by the plaintiffs before the Appellate Court, by filing Regular Civil Appeal No. 35 of 2018. The Appellate Court has allowed the appeal and set aside the decision of the Trial Court, whereby application Exhibit-16 was partly allowed and further directed the Trial Court to deal with the relief of declaration under section 9 of the Civil Procedure Code in accordance with the law. This order is impugned by the original defendant, by filing Second Appeal No.917 of 2022.

6. Heard learned advocate for the petitioner and learned Senior Advocate for the respondents. Perused the memos of writ petition and second appeal and the documents annexed along with the same, orders impugned in both the proceedings and the citations relied on by the learned advocates.

7. Learned advocate for the petitioner strenuously contends that the Trial Court has committed serious error of law in rejecting only part of the plaint. In fact the plaint ought to have been rejected as a whole and, there cannot be a part rejection. In support of his submissions, he relied on following citations :

1. *“Sejal Glass Ltd V/s Navilan Merchants Pvt Ltd.” AIR 2017 SC 4477.*
2. *“Kalepu Pala Subrahmanyam V/s Tiguti Venkata Peddiraju and Others” AIR 1971 AP 313*
3. *“Bansi Lal V/s Som Prakash and Other” AIR 1952 Punjab 38*
4. *“Chandrakant Vassudev Lotlikar and Others V/s Vaman Mahadev Lotlikar and Others” AIR 1989 Bombay 17*

8. Learned advocate for the petitioner submits that once having come to the conclusion that there is bar of section 146 of the Prohibition Act, the Trial Court ought to have rejected the entire plaint. He submits that looking to the nature of the reliefs claimed by the plaintiffs, jurisdiction of the civil court is barred under section 146 of the Prohibition Act and, he, therefore, submits that the order impugned in the writ petition is liable to be quashed and set aside and the plaint is liable to be rejected as a whole.

9. Per contra, learned senior advocate for the respondents submits that no order passed under the Prohibition Act is under challenge in the suit filed by the plaintiffs and, therefore bar under section 146 of the Prohibition Act is not applicable to the suit. He further submits that the reliefs claimed in the plaint are in respect of the agreement dated 22nd June, 2015 entered into between the plaintiffs and the defendant. He submits that after declaration is issued by the civil court that in case the suit is decreed, then only the procedure under the Prohibition Act will be followed for cancellation of the license. The plaintiffs have not claimed any relief against government or the government officers and, therefore, the first Appellate Court has rightly directed to entertain the suit. He further submits that in the proceedings filed before the government authorities, under the Prohibition Act, the Commissioner, vide order dated 6th December, 2019 has held that after the final outcome of the civil litigation, the appellants therein / respondents – plaintiffs, are granted liberty to file appropriate application before the District Collector, Parbhani seeking changes in record of CL-III license No.13. He, therefore, submits that the Civil Court is empowered to decide the suit filed by the plaintiffs – respondents. In support of his submissions, he relied on :

1. *“Church of North India V/s Lavajibhai Ratanjibhai and Others” (2005) 10 SCC 760*
2. *“Shripat Chaituji Mahajan V/s Sanjay Radheshyam Jaiswal and Others” 2002 (5) Mh.L.J. 528*
3. *Decision of learned Single Judge of this Court in Second Appeal No.899 of 2016 dated 16th July, 2021 (Baburao Ganpatrao Jathkar V/s The State of Maharashtra and others)*

10. In reply, learned advocate for the petitioner submits that the suit ought to have been filed by the plaintiffs under Specific Relief Act and the suit as is filed, is not maintainable and, therefore the plaint is liable to be rejected under Order 7 Rule 11 of the Civil Procedure Code.

11. Perusal of the plaint reveals that the Government officers and / or authorities under Excise Act i.e. Collector or Commissioner etc. are not party defendants in the suit. No relief is claimed against Government authorities in the suit. The suit appears to be based on agreement dated 22nd June, 2015, on the basis of which CL-III license is transferred in the name of the defendant. A declaration is sought that said transfer of license in the name of the defendant on 22nd June, 2015 is illegal, ultra vires and not binding on the plaintiffs. A mandatory injunction is sought directing the defendant to make necessary application to the Collector for transfer of Country Liquor license. A perpetual

injunction is sought to restrain the defendant from carrying the business under CL-III license No.13. So also to restrain the defendant from transferring the disputed license in the name of third party.

12. From the pleadings in the plaint it appears that in terms of the agreement, the license was transferred in the name of the defendant on the condition that the defendant shall pay Rs.35 lakh towards goodwill. It is further claimed that the entire amount was to be deposited by the defendant immediately on the day of permission granted by the Collector to transfer the license to plaintiff No.1, by cheques. Accordingly, plaintiff No.1 made application and the license was transferred in the name of the defendant. However, the cheques issued by the defendant to the plaintiff are bounced, for which the plaintiff No.1 has filed SSC No. 930 of 205 under section 138 of the Negotiable Instruments Act. So also criminal complaint, bearing Criminal M. A. No. 387 of 2017, is filed against the defendant and his two sons, in the Court of Judicial Magistrate, First Class, Parbhani for offence punishable under sections 420, 468, 469, 471, 406, 120B of the Indian Penal Code. It is further contended that the plaintiffs filed application for restoration of disputed license to the Collector, which was disposed of by the Collector stating that

he has no power to review his own order. Against the said order, plaintiff No.1 has filed appeal No.122 of 2017 to the Commissioner State Excise.

13. By order dated 6th December, 2019, the Commissioner has made following observations.

“6. *I record my observations as under :*

- i) *There is no written / documentary objection raised by appellant or respondent no.2 to transfer the said licence in the name of the respondent no.2. in May 2015 i.e. there was goodwill in the above deal.*
- ii) *Based on the applications, Collector of Parabhani by the letter dtd. 22.06.2015 proceeded for transfer of said CL-III licence in the name of the respondent no.2.*
- iii) *The first objection was raised by the appellant after 2 years from the transfer of the said CL-III license in the name of the respondent no.2.*
- iv) *As per the agreement dated 22-08-2015, it was categorically stated by Respondent No.2 that he is indemnifying against the payment by cheque and in the event if cheques are bounced / were not cleared then the transfer of the licence in his name shall be treated as a cancelled and he will fully co-operate for the transfer of the said licence in the name of the appellant.*
- v) *Perusal of the Civil Suit filed by the Appellant bearing no. RCS No. 249/17 in court of learned Civil Judge Senior Division at Parbhani, I record my findings that, after the final outcome of the civil litigation, the appellant is granted liberty to file appropriate*

application before the District Collector,Parabhani seeking the changes in the record of CL-III licence No. 13.”

14. The Appellate Court, while setting aside the order of the Trial Court has observed :

“.... the learned trial Court has lost sight of the vital fact that so far as the relief of declaration is concerned, the said relief of declaration can only be granted by only Civil Court and no other Court is empowered to grant the relief of the declarations under the provisions of the Specific Relief Act, 1963. The relief No.01 being fall within the provisions of Specific Relief Act and those reliefs which are available to seek to the needy party, such needy party can only knock the doors of the Civil Court for any specific relief which he or she is entitled to be.”

It is held that the Trial Court might be confused with the nature of the relief sought. It is further observed that

“If the nature of the relief sought is carefully seen, the declaration is sought for the transfer of the liquor licence in favour of the respondent by the original plaintiffs, is illegal, ultra-virus and not binding upon the rights of the appellants plaintiffs..... So far as the second aspect of the said declaration which pertains in view of the seeking first para of the declaration, the appellants / original plaintiffs sought said declaration as per relief No.01 that licence is required to be cancelled i.e. the country liquor licence CL-III-13. It goes to show that it is not prayed to declare that the country liquor licence to declare as a cancelled licence. Therefore, it is my considered opinion that the said relief of declaration is very well falling within the ambit and purview of Section 9 of CPC, which vests within the Civil Courts only.”

15. Thus, the First Appellate Court has rightly come to the

conclusion that the reliefs claimed in the plaint fall within the ambit and purview of jurisdiction of the Civil Court.

16. In "***Sejal Glass Ltd***" (*supra*), it is held that there cannot be partial rejection of plaint. The same principle is reiterated in "***Kalepu Pala Subrahmanyam***", "***Bansi Lal***" "***Chandrakan tVassudev Lotlikar***" (*supra*). There cannot be any dispute about the said principle, however, in the case in hand, since this Court is of the view that the bar under section 146 of the Prohibition Act is applicable to the facts of the present case, the Appellate Court has rightly set aside the order of the Trial Court, thereby partially rejecting the plaint.

17. In "***Church of North India***" (*supra*), the principles summarized in "***Dhulabhai V/s State of M.P. (1968) 3 SCR 662***", are mentioned. The relevant principles, applicable to the facts of the present case are -

"1.....

2.....

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally

associated with actions in civil courts are prescribed by the said statute or not.”

18. In **"Shripat Chaituji Mahajan"** (*supra*), learned Single Judge of this Court, in the similar facts, has held :

“12. It is true that under section 146 of the Bombay Prohibition Act, there is bar for a suit or proceeding against the government or against any prohibition, police or other officers or against any person empowered to exercise his powers or perform functions under this Act for anything in good faith done or intended to be done under this Act, but then that does not exclude the jurisdiction of the Civil Court for deciding the issue relating to dissolution of the partnership firm which fact is related to the grant of licence or deleting the name of any partner after the licence is granted. The bar under section 146 is certainly restricted to the functions and actions on the part of the authorities or police, acting under the provisions of the Bombay Prohibition Act, provided the action is done in good faith or purporting to be done so under the Act. That is why the decision in 2000 (3) Mh.L.J. 585 relied upon by the applicant has no application to the case before hand. What is contemplated under section 137 and 138 of the Prohibition Act is that the parties who are aggrieved by the orders passed by the prohibition officers have a remedy and when statute provides for a specific remedy which encompasses reliefs of all natures arising out of exercise of powers by the prohibition officer then by necessary implication the jurisdiction of the Civil Court is barred. This court has observed that the action on the part of the Prohibition Officer acting under the provisions of the Bombay Prohibition Act while exercising the administrative powers can be examined by the authorities under section 137 by way of appeal and under section 138 in exercise of the powers of the revision by the State Government, and, therefore, then jurisdiction of the Civil Court is barred.

16. *In the decision reported in AIR 1991 SC 1546, the Apex Court observed that – IF for part of the reliefs the suit is maintainable in the forum where it has been laid, it is not open to the forum to shut out its doors to the suitor.”*

17. *At the cost of repetition, therefore, we may state that the controversy involved in the case before hand was exclusively within the domain of the Civil Court so far as it relates to the issue as to the controversy over the dissolution of partnership as claimed by respondent No.1. We may state that even the Collector – respondent No.3 could not have decided either granting of licence or deleting the name of either of applicant or respondent No.1 from the licence, unless this controversy as to the dissolution of the partnership firm of applicant and respondent No.1 were admittedly partners, was dissolved. Civil Court has jurisdiction to decide the issue regarding the dissolution of partnership firm over which there has been controversy between the parties. The Trial Court has not committed any error, illegality or material irregularity in assuming the jurisdiction to be vode the issue.”*

These observations support the case of the respondents.

19. No jurisdictional error or error of law is committed by the Appellate Court while allowing the appeal filed by the plaintiffs. The Trial Court has erred in interpreting the pleadings of the parties in juxtaposition to section 146 of the Prohibition Act and, therefore, the Appellate Court has rightly set aside the order passed by the Trial Court. No merit is found in the writ petition as well as in the second appeal. No question of law is made out

by the appellant in the second appeal. Consequently, the writ petition and second appeal both are dismissed.

20. In view of disposal of the second appeal, nothing survives in the civil application No. 17366 of 2022 and the same is disposed of as such.

[NITIN B. SURYAWANSHI]
JUDGE

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