

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.448 OF 2014

Pawankumar Laxman Jha ...Petitioner
versus
The Collector of Pune
and Others ...Respondents

Mrs. Veena Thadhani, for the Petitioner.
Ms. Vaishali Nimbalkar, AGP for Respondent
Nos. 1, 2 and 4.
Mr. D.B. Sawant a/w. Mr. Santosh Patil for
Respondent No. 3.
Mr. Abhijit Kulkarni for Respondent No. 5.
Respondent No. 3 present in Court.

CORAM : M. S. SONAK, J.

DATE : 27TH FEBRUARY 2015

P.C. i-

- Rule.
- 2. With the consent and at the request of learned counsels for the parties, rule is made returnable forthwith.
- 3. The challenge in this petition indeed basically survives with regard to order dated 24th

January, 2014 made by the Collector, Pune granting in favour of respondent No. 3 FL/BR-II under the provisions of Maharashtra Provincial Municipal Corporations Act, 1949 ("said act") and Bombay Foreign Liquor Rules, 1953 ("said rules").

4. The basic objection of the petitioner is that grant of such licence is in breach of rule 25(2) of the said rules which *inter alia* provides that no such licence should be granted in respect of any shop, if such shop is within the distance of 50 meters from the religious institution. The term "*religious institution*" for the purpose of said rules has been defined and includes,

"An institution for the promotion of any religion and includes a temple, math, mosque, church, synagogue, agiary or other place of public religious worship which is managed or owned by a public trust registered under the Bombay Public Trusts Act, 1950 and includes such other religious institutions as the State Government may by order specify in this behalf".

5. Incidentally sub rule 2 of rule 25 of said rules itself provides the manner of determination of distance of 50 mtrs. as aforesaid. The distance is required to be measured from mid-point of the entrance of shop along with nearest path by which pedestrian ordinarily reaches.

6. The respondent No. 1, initially granted licence in favour of respondent No. 3 on 28th June, 2012. The same was questioned by the petitioner by instituting an appeal before the Commissioner of State Excise. The commissioner made an interim order dated 2nd August, 2012 staying the licence dated 28th June, 2012 upon being *prima facie* satisfied that licence was obtained after construction of compound wall between the temple and the shop, so that the distance between the two is more than 50 meters. However, the Commissioner noted that after licence was obtained, the compound wall was demolished. As a result at least *prima facie* the distance between the temple and the shop was reduced to less than 50 meters.

7. At the stage when the appeal came up for final hearing before the Commissioner, respondent No. 3 once again reconstructed the compound wall and on the said basis urged that the distance between the temple and the shop is in excess of 50 meters. Upon verification that the wall had indeed be reconstructed, the Commissioner of Excise by an order dated 1st April, 2013 dismissed the petitioner's appeal and upheld the grant of licence dated 28th June, 2012.

8. The petitioner carried the matter in revision before the State Government. The Minister (Excise) by an order dated 18th October, 2013 allowed the petitioner's revision application partly and the Collector, Pune – respondent No. 1 herein was directed to remeasure the distance between the temple and the shop premises and thereafter take appropriate decision in the matter.

9. The petitioner, then instituted the present petition by contending that since the wall

had been reconstructed by the respondent No. 3 the exercise of remeasurement would be a mere futility. The petitioner also contended that the wall which had been constructed by respondent No. 3 was an illegal construction in respect of which Pune Corporation had already issued notice of demolition on 20th March, 2013. In these circumstances, the petitioner contended that there was no question of respondent No. 3 being permitted to draw any mileage on the basis of such illegal construction.

10. This Court made an order dated 20th January, 2014 basically recording aforesaid contentions of the petitioner and issued notice to the respondents. In response, an affidavit in reply has been filed on behalf of respondent Nos. 1, 2 and 4. The affidavit in terms states that distance between temple and the shop is 54 meters and that such distance has been measured by taking into consideration the wall constructed by respondent No. 3 at the site. As regards the issue of illegality or otherwise of the wall in question,

the affidavit states that this is not a concern of the authorities under the Excise law because such subject matter pertains to the jurisdiction of Municipal Corporation.

11. Respondent No. 3 has also filed an affidavit in reply, which is broadly to the following effect :-

- a) That the so called temple which is made the basis for disputing the licence granted to respondent No. 3, is not at all owned or managed by a registered trust.
- b) In the alternate, registered trust has no connection with the temple in question.
- c) For the aforesaid reasons, temple in question can not be regarded as a "*religious institution*" for the purpose of rule 25(2) of the said rules.
- d) In any case, even without taking compound wall into consideration, the distance between the temple and the shop is more than 50 meters.

12. This petition was taken up for consideration on 24th February, 2015. At this stage, when the Court inquired with the learned counsel appearing for respondent No. 5 as to the status of notice dated 20th March, 2013 by which respondent No. 5 had directed the demolition of the compound wall, the learned counsel for respondent No. 3 upon taking instruction from respondent No. 3 who was present in the Court, stated that notice dated 20th March, 2013 had already been revoked. Two days time was sought to produce the revocation order. Accordingly, this matter was placed for hearing today dated 27th February, 2015.

13. On 27th February, 2015 the learned counsel for respondent No. 3 fairly stated that the statement made on 24th February, 2015 on the basis of instruction from respondent No. 3 was incorrect. There was no revocation order with regard to the notice dated 20th March, 2013. The learned counsel for the petitioner placed on record certain photographs which indicates that on 26th February,

2015 at least portion of compound wall was hurriedly demolished in purported compliance with the notice dated 20th March, 2013. The learned counsel for the petitioner contends that the demolition is not complete and some portion of unauthorized compound wall still stand at the site.

14. The learned counsel for respondent No. 3 upon instruction from respondent No. 3 who is even today present in the Court states that respondent No. 3 undertakes to this Court that the demolition of the compound wall referred in the notice dated 20th March, 2013 would be completed within a period of one week from today. Further, by 3rd March, 2015, respondent No. 3 shall file a formal written undertaking in the aforesaid regard with the Registry of this Court. Such undertaking is accepted. The respondent No. 5 to ensure that the compound wall in question is fully demolished within a period of one week. If, for any reason, such undertaking is not complied with, then apart from action in exercise of contempt jurisdiction,

respondent No. 5 is directed to itself execute its order dated 20th March, 2013 within a period of one week. There shall be no necessity of any further notice to respondent No. 3 in this regard. Respondent No. 5 to file compliance report before this Court within a period of two weeks thereafter.

15. The learned counsel for respondent No. 3, has however strenuously contended that the temple in question cannot be regarded as a "*religious institution*" for the purpose of rule 25(2) of the said rules. At this stage, there is no question of entertaining any such contention on behalf of respondent No. 3. This is because the authorities under the Excise Act, at the stage of grant of licence have not accepted any such contention. The authorities have proceeded on the basis of that the temple in question is indeed a religious institution, but have maintained the distance between temple and the shop is more than 50 meters. Besides, the petitioner has produced on record a registration certificate dated 27th December, 2011

issued by the Charity Commissioner, Pune under the provisions of Bombay Public Trust Act, 1950 in respect of "Shree Chintamani Ganesh Mandir Trust" which manages and owns the temple in question. This is a sufficient compliance to conclude that the temple in question is a "*religious institution*" for the purpose of rule 25(2) of the said rules.

16. The learned counsel for respondent No. 3 further contended that even *de-hors* the compound wall, the distance between the temple and the shop is in excess of 50 meters. This is a disputed issue. Apart from *prima facie* opinion expressed by the Commissioner State Excise in his order dated 2nd August, 2012, there is no clear material on record as to whether the distance between the temple and the shop is more or less than 50 meters if the compound wall is excluded from consideration.

17. Accordingly, it is appropriate if the City Survey Officer, Pune is directed to visit the site

and to take measurement of the distance between the temple and the shop, within a period of three weeks from today. In taking such measurement, the City Survey Officer shall apply the principles provided in rule 25(2) of the said rules. Such inspection/ measurement shall be carried out with the notice to the petitioner, respondent No. 3 and the State Excise authorities. All parties are directed to render every possible cooperation to complete this exercise within the period as prescribed.

18. The City Survey Officer shall furnish report of the measurement to the State Excise authorities within aforesaid period. If the distance between the temple and respondent No. 3's shop is found to be less than 50 meters, respondent No. 3 shall stop operations for the sale of liquor and wine from his shop forthwith. However, within a period of one week from such stoppage, respondent No. 3 shall be at liberty to apply to the State Excise authorities for shifting the same to the alternate premises which fulfill the requirements

as prescribed under the said act and the said rules made there under. If such application is made within period aforesaid, State Excise authorities to consider the same in accordance with law.

19. Rule, is made absolute to the aforesaid extent.

20. The respondent No. 3 is however required to pay costs. This is because respondent No. 3 obtained licence on the basis of construction of a compound wall. Thereafter, respondent No. 3 demolished such wall. Further realising that such demolition might reduce the distance between the religious institution and the shop to less than 50 meters, respondent No. 3 once again reconstructed the compound wall. The construction of the compound wall was unauthorized as is evident from the demolition order issued by the Corporation on 20th March, 2013. The respondent No. 3 made a solemn statement to this Court that the order dated 20th March, 2013 had been revoked, when in fact the same

had not been revoked. Therefore, hurriedly respondent No. 3 commenced the process of demolition of compound wall but even the same was left incomplete. For all these reasons, it is proper that respondent No. 3 pays cost of Rs. 25,000/- (Twenty Five Thousand). The respondent No. 3 offers to pay such cost to the "Kirtikar Law Library" and shall do so within a period of two weeks from today.

(M. S. SONAK, J.)