

CASE NO.:
Appeal (civil) 3059 of 2006

PETITIONER:
Vikrama Shama Shetty

RESPONDENT:
State of Maharashtra & Ors

DATE OF JUDGMENT: 20/07/2006

BENCH:
ARIJIT PASAYAT & R.V. RAVEENDRAN

JUDGMENT:
J U D G M E N T
(Arising Out of SLP (C) Nos. 23983-23984 of 2005)

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the legality of judgment rendered by a Division Bench of the Bombay High Court in Appeal Lodging No.75/2005 in Writ Petition No.2736/2004.

The question that arose for consideration in the writ petition and the appeal therefrom is whether the revisional authority under The Bombay Prohibition Act, 1929 (hereinafter referred to as the 'Act') was right in refusing FL-III license to the appellant on the ground that the distance between the establishment of the appellant and the entrance to a mosque is less than 75 metres. Learned Single Judge held on the basis of the report given by the Court Commissioner that the distance was less than 75 metres and, therefore, in view of what is provided in Rule 45(1-C) of the Bombay Foreign Liquor Rules, 1953 (in short the 'Rules') the license could not have been granted. The view was upheld by the Division Bench by the impugned judgment.

Background facts in a nutshell are as follows:

Appellant applied for obtaining license (permit) to enable him to sell foreign made liquor since no objection certificate was obtained from the mosque trust for grant of such license. The Commissioner of Police raised objection to the grant of the license. The Collector of Bombay City, State Excise Department rejected the application on the ground that there was a religious institution within the 60 metres from the restaurant. An appeal was preferred under Section 137(2) of the Act to the Commissioner of Prohibition and Excise. The appeal was allowed by order dated 26.3.1999 on the basis of certificate issued by the Chartered Architect certifying that the distance between mosque and the restaurant was 75.43 metres. On the basis of the directions given by the Appellate Authority license was granted on 1.4.1999. After grant of license, appellant filed an application before the Collector for issuance of public entertainment license. The Commissioner of Police filed revision before the Minister of State for Excise for revoking the order passed by the Commissioner granting FL-III license. The revisional authority set aside the order of the Commissioner and the order of the Collector rejecting the license was confirmed. A Writ Petition was filed before the

High Court, which was heard by a learned Single Judge. Basic issue raised related to the distance, and the alleged grant of license to similarly situated persons whose establishments were situated less than 75 metres. A Court Commissioner was appointed to find out the factual details. On the basis of his report, learned Single Judge dismissed the writ petition holding that the distance of 75 metres is mandatory as prescribed by rule 45(1-C) of the rules. From the report of the Commissioner it is clear two entrances (first and third entrance) to the mosque are within the mandatory distance of 75 metres. In the appeal filed before the Division Bench stand was taken that the entrances are not frequently used and, therefore, distance of second entrance only was to be taken into consideration for the purpose of measurement. It was pointed out that main entrance to the mosque is from Narsi Natha Street, which is at a distance of 98.47 metres, i.e. more than 75 metres. The Division Bench concurred with the findings of the learned Single Judge. Reference was made to the Commissioner's report and certified photographs.

In support of the appeal Mr. U.U. Lalit, learned senior counsel submitted that the language of Rule 45(1-C) makes the position clear that reference is made to the path by which pedestrian ordinarily reaches the religious institute. Since the two entrances are not ordinarily used and are only sometimes used, the distance has to be reckoned from the second entrance gate which is admittedly beyond 75 metres. It was further submitted that the mosque management had no objection to the functioning of the appellant's restaurant. In fact, they have given their consent. The High Court did not take note of the fact that in some other cases establishments were functioning within the limit of 75 metres, and there is no reason to make a departure so far appellant is concerned. The Commissioner's order is in essence final. After long lapse of time revision petition was filed by the police authorities and the same should not have been entertained.

Learned counsel for the respondent-State and its functionaries supported the order.

Rule 45(1-C) is the pivotal provision and it reads as follows:

"(1-C) No licence under sub-rule (1B) shall be granted in respect of any hotel or restaurant which is situated within a distance of seventy-five meters from any educational or religious institution or from any bus stand, station or depot of the Maharashtra State Road Transport Corporation or from the boundary of any National or State highway :

Provided that nothing contained in this sub-rule shall apply in respect of an existing hotel or restaurant for which a licence in Form FL-III is held by the Manager or Proprietor thereof immediately before coming into force of the Bombay Foreign Liquor (Amendment) Rules, 1990.

Explanation :- For the purposes of this sub-rule \026

(i) "educational institution" means any pre-primary, primary, or secondary school

managed or recognized by any local authority or the State Government or the Central Government and any college affiliated to any University established by law, but does not include any private coaching institution;

(ii) "religious institution" means 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 (Bom xx/x of 1950) and included such other religious institutions as the State Government may by order specify in this behalf;

(iii) The distance referred to in clause (a) of this sub-rule shall be measured from the mid-point of the entrance of the hotel or restaurant along with the nearest path by which the pedestraian ordinarily reaches, -

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

(c) the boundary of the National or State highway".

A bare reading of the provisions makes the position clear that the distance requirement is mandatory.

Initially in pursuance of an order dated 17th December 2003 passed by a learned Single Judge of the High Court, joint measurements were taken and the report of the joint measurement dated 19th December 2003 is that the distance is less than 75 meters. Again when the matter was before the High Court for admission, an order was passed on 3rd November, 2004, by a learned Single Judge by which the Prothonotary and Senior Master was directed to appoint an Architect from the panel of Architects maintained by the Court to carry out a measurement in terms of Rule 45(1-C). The Architect submitted his report together with a plan before the High Court.

The report of the Architect shows that the Hotel belonging to the Petitioner abuts Abhaychand Gandhi Marg and the mosque is located across the road at the junction of Abhaychand Gandhi Marg and Narsi Natha Street. The mosque has three entrances out of which two are from a common passage having access to Narsi Natha Street. The third entrance is from Abhaychand Gandhi Marg.

The Court Commissioner has reported that distance from the first entrance to the mosque from Narsi Natha Street upto the establishment of the appellant is 68.45 meters. Though the door to the mosque was closed when the Commissioner went for inspection, the report records that the door was opened on the request of the Commissioner and it was found that it directly opened into the prayer hall of the mosque.

The second entrance to the mosque from Narsi Natha Street is at a distance of 98.47 meters. The third entrance to the mosque from Abhaychand Gandhi Marg is at a distance of 60.06 meters. The report of the Commissioner notes that this door is generally closed and is occasionally used as an exit. The Commissioner has further recorded that during the course of inspection, he was informed that generally people enter the mosque through the second entrance.

From the report of the Commissioner appointed by the High Court it is clear that two entrances to the mosque are within the mandatory distance. It may be that, as rightly noticed by learned Single Judge, on a particular occasion one of the entrances may be closed. It has also been noted that one of the entrances is used as an exit. The stress is on the nearest distance and not the most used distance. An attempt was made to show that the second entrance is most used one. Though there was an earlier report, we find that the same was not accepted by the High Court at some stage and, therefore, the Court Commissioner was appointed. There is no challenge to the correctness of the Court Commissioner's report. That being so, the learned Single Judge and the Division Bench were justified in their view that the restaurant is situated within the prohibitory distance of 75 metres.

Another plea which was emphasized was the existence of some restaurants to whom licences have been granted.

"As highlighted by learned counsel for the appellants, even if it is accepted that there was any improper permission, that may render such permissions vulnerable so far as 32 vessels are concerned. But it cannot come to the aid of respondents. It is not necessary to deal with that aspect because two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case; direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India, 1950 (in short 'the Constitution') cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs or par. Even if hypothetically it is accepted that wrong has been committed on some other cases by introducing a concept of negative equality respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality." (See Union of India and Anr. v. International Trading Co. and Anr. (2003 (5) SCC 435).

Stand that the revision was at the instance of police authorities is clearly undisputed. Section 148 of the Act empowers State Government to call for and examine records of any proceeding before any Prohibition Officer for the purpose of satisfying itself as to correctness, legality or propriety of any

order passed in and as to the regularity of any such proceedings. The power of suo moto revision is clearly vested in the State Government. If it acted on the basis of petition filed by police authorities, it cannot be said that the exercise was beyond jurisdiction.

Looked at from any angle the orders passed by learned Single Judge and Division Bench do not suffer from any infirmity to warrant interference.

The appeal fails but in the circumstances without any order as to costs.

JUDIS