

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9023 OF 2013

Jagdish N. Shetty)
Age 46 yrs., Sole Proprietor)
of M/s. Om Sai Video Game)
Parlour located at Shop No.13)
Plot Nos.22 and 23, Sai Kaka)
C.H.S. Sector-3, Sanpada)
Navi Mumbai, Dist. Thane)

...Petitioner

Vs.

1. Commissioner of Police)
Office of Commissioner of)
Police, Navi Mumbai,)
Dist. Thane.)
2. Assistant Commissioner)
of Police (Administration,))
Office of Commissioner of)
Police, Navi Mumbai,)
Dist. Thane,)
3. State of Maharashtra)

.. Respondents

.....
Mr. J.S. Chandnani for the Petitioner.
Mr. P.G. Sawant for the State.

.....

CORAM : M.S.SONAK, J.

Judgment reserved on : 17 October 2013
Judgment pronounced on: 28 October 2013

JUDGMENT :

1. Rule. Rule is made returnable with the consent of all the parties,
forthwith.

2. This is the third petition filed by the Petitioner seeking licence under the provisions of the Bombay Police Act, 1951 to commence Video Game Parlour at Shop No.13, Sanpada, Navi Mumbai.

3. On 20th October 2009, the Petitioner applied to the Commissioner of Police – Respondent No.1 for licence to commence Video Game Parlour. Prescribed/requisite documents were enclosed alongwith the application. For over six months, there was no consideration of the Petitioner's application and therefore the Petitioner preferred Writ Petition No.3448 of 2010 seeking a writ of mandamus to direct Respondent No.1 to consider the Petitioner's application for licence. The petition was disposed of by the Division Bench of this Court by a judgment and order dated 30th April 2010 with directions to Respondent No.1 to dispose of the application expeditiously and in any case within six weeks in accordance with law.

4. By an order dated 29th June 2010, Respondent No.1 declined licence to the Petitioner on the ground that there is no independent parking space in front of the shop where the Video Game Parlour was proposed to be set up and if licence is granted, probability of law and order situation developing in the locality cannot be ruled out.

5. The Petitioner appealed against the order dated 29th June 2010 to

the Minister (Home), State of Maharashtra, which appeal was dismissed and the appeal dismissal order communicated on 6 February 2012.

6. The Petitioner thereupon preferred Writ Petition No.3962 of 2012 before this Court, which was disposed of by the judgment and order dated 4th September 2012. The relevant extracts from the said judgment are reproduced for the sake of reference:

- “1.
2.
3. *My attention is invited to the No Objection Certificate from the local Police Station, but what has been stated on affidavit by the State is that the Traffic Police have given a report wherein it is stated that 12 feet road from the Petitioner's establishment towards Sanpada highway is declared as no parking and there is no parking place for the Video Game Parlour.*
4. *On taking instructions, Ms.Thadhani, learned counsel appearing for the Petitioner, states that the Petitioner will give an undertaking to the authorities that if the Video Game Parlour business is allowed to be commenced and carried out, the Petitioner will make appropriate parking arrangement of vehicles of those who are visiting the Video Game Parlour and which arrangement shall be made in private property. Further, the Petitioner will ensure that the visitors to the Video Game Parlour park their vehicles in the allocated spaces of parking and areas, such as pay and park scheme and shall not cause any obstruction to the smooth flow of vehicles on public road and particularly 12 feet road towards Sanpada highway. She also submits that no parking of vehicles will be permitted by the Petitioner in the spaces and areas which are specified as no parking.*
5. *In these circumstances if the Petitioner furnishes such an undertaking to the authorities and ensures its compliance, then, I see no reason as to why the Petitioner should be denied the licence.*
6. *If the aforesaid objection is the only one, based on which, the authorities have denied the licence, then, with the*

aforementioned arrangements there should not be any impediment in quashing and setting aside the orders under challenge. They are, accordingly, quashed and set aside. It is directed that the Commissioner of Police, Navi Mumbai shall consider the Petitioner's application afresh and since the Petitioner is ready and willing to furnish the above undertaking, the Licensing Authority should take a decision as expeditiously as possible and within a period of two weeks from the date an undertaking is furnished by the Petitioner.

7. The learned counsel appearing for the Petitioner states that such undertaking will be furnished within one week from today. The Licensing Authority shall take a decision on the Petitioner's application uninfluenced by any orders passed earlier including the observations in the order of the Appellate Authority which stands quashed and set aside. The Writ Petition is disposed of in these terms. No costs. All concerned to act on an authenticated copy of this order."

7. The Petitioner, in compliance with, the statements recorded in the petition, submitted affidavit-cum-undertaking dated 11th September 2012 and 18th October 2012.

8. In the affidavit-cum-undertaking dated 11th September 2012, the Petitioner submitted thus :

"1. I say that if a Video Game Parlour licence is granted to me, I will make appropriate parking arrangements for vehicles of those who are visiting the Video Game Parlour and the arrangement will be made by me in private property. I will ensure that visitors to the Video Game Parlour park their vehicles in the allocated spaces of parking and areas, such as pay and park scheme and shall not cause any obstruction to the smooth flow of vehicles on public road and particularly 12 feet road towards Sanpada Highway.

2. I further stated that I will not permit any parking of vehicles in the places and areas which are specified as no parking zones."

9. In the affidavit-cum-undertaking dated 18th October 2012, the Petitioner submitted thus :

"1. I say that the area of my shop is 360 Sq. Ft. approximately. I say that I have made arrangements for parking of vehicles for my customers at pay and Parking scheme situated at very opposite to my shop premise. I have made a contract with pay and parking management for a four wheeler and three two wheeler for a period of quarter year, which I will renew it from time to time. I have attached a plan of premise (Shop No.13) which also indicates the pay and parking area near my shop. I have also attached the plan of my society sanctioned by CIDCO authorities in the year 1990 showing the parking area behind my shop in the society also.

2. I will ensure that visitors to the Video Game Parlour park their vehicles in the allocated spaces of parking Scheme and shall not cause any obstruction to the smooth flow of vehicles on public road. It will be my responsibility to ensure the correct place for parking the vehicles.

3. I further state that I will not permit any parking of vehicles in places and areas which are specified as no parking zones."

10. Normally, in the light of observations made by this court in Writ Petition No.3962 of 2012 and upon verification of the compliances as aforesaid, Respondent No.1 should have issued the necessary licence to the Petitioner. It was always open to the Respondent No.1 to impose conditions in such licence for the purpose of ensuring that a reasonable parking facility is at all times maintained and made available for the customers of the Parlour. However, by order dated 1st November 2012, Respondent No.1 once again declined licence on the same ground. The order dated 1st November 2012 states that the parking arrangements made by the Petitioner with the 'Pay and Park' facility established by

CIDCO, just opposite the Petitioner's shop, is for hardly three months and therefore same cannot be regarded as any permanent arrangement.

11. The Petitioner addressed several representations including representations dated 20th November 2012, 2nd May 2013, 5th April 2013 and 22nd August, 2013 urging reconsideration of the matter. The Petitioner in his representations pointed out that he was ready and willing to furnish an undertaking that the arrangement with the CIDCO Pay and Park facility would be renewed and made co-terminus with the term of the licence, should the same be granted to him. The Petitioner, who in the meanwhile had obtained some documents under the Right To Information, placed reliance upon them to contend that the Police Authorities and the Traffic Police Authorities upon site inspection and consideration of various relevant parameters had issued No Objection Certificate for issuance of licence to the Petitioner.

12. The Maharashtra Video Amusement Parlour Association also addressed a representation dated 16th February 2013 to Respondent No.1, inter alia pointing out that the requirement of independent parking facility which was being insisted in the case of the Petitioner was neither one contemplated under the Rule, nor was the same reasonable. The Association pointed out that normally their members are middle class

persons, who set up such Parlours in shops having area of not more than 20 to 30 Square Meters and therefore it is not possible for them to have any independent parking facilities. The Association pointed out that number of customers at such Parlours is also limited and parking will certainly not pose a problem of any great magnitude.

13. Having secured no redressal, the Petitioner for the third time has preferred the present Petition seeking to quash the impugned order dated 1/11/2012 (Exhibit-H to the petition) and for directions to Respondent No.1 to grant the Petitioner licence for commencing the Video Game Parlour.

14. I have heard Mr. Chandnani, learned Counsel appearing for the Petitioner and Mr. Sawant, learned AGP for the Respondents. With their assistance, I have perused the documents and correspondence on record.

15. Mr.Chandnani appearing for the Petitioner made the following submissions in support of the petition:

- (a) The only ground for refusal of the licence was the issue of parking. This ground was considered by this court in Writ Petition No.3962 of 2012 and found to be untenable, provided the Petitioner makes arrangement for parking and report compliances. The Petitioner has done all that was required by

him in the judgment and order dated 4th September 2012;

(b) The police authorities and the traffic police authorities, upon inspection and examination of various parameters, themselves issued NOC for grant of licence. Such NOCs have either not been considered at all or in any case they have been rejected for no valid or cogent reasons; and

(c) There are no provisions under the Bombay Police Act, 1951 or the Rules made thereunder, which make requirement of independent parking facility, a precondition for grant of licence for Video Game Parlour. In absence of any such specific provisions, the Respondents can insist upon the same, particularly as this would constitute infringement of the Petitioner's fundamental right to carry out trade, occupation or business as guaranteed by Article 19(1)(g) of the Constitution of India.

16. On the other hand, Mr.Sawant appearing for the Respondents submitted that this court whilst disposing of Writ Petition No.3962 of 2012 did not issue any directions for grant of licence, but the direction was to take a decision in the matter. Such decision has been taken and therefore there is no breach of judgment and order dated 4th April 2012 passed in Writ Petition No.3962 of 2012. He further submitted that the State

Government has framed guidelines for grant of such licences and one of the guidelines requires the Authorities to ascertain whether independent parking arrangements are available and whether parking would occasion any obstructions to free flow of traffic. The arrangements proposed by the Petitioner are only temporary and the same do not amount to independent parking arrangements. In the circumstances, the licence has been denied upon the grounds, which are reasonable as well as germane.

17. Before, I advert to the peculiar facts and circumstances of this case, I must observe that whilst the police Authorities have substantial discretion in the matter of grant or refusal of licences of this nature, such discretion, nevertheless is not unfettered. The discretion in such matters has to be exercised by advert to relevant considerations and eschewing irrelevant ones. In exercising of such discretion, the Authorities are bound by doctrine of reasonableness as well as proportionality. The Authorities have to be alive to the position that the Constitution of India by way of Article 19(1) (g) guarantees every citizen has right to carry on trade, occupation or business. Reasonable restrictions as contemplated by Article 19(6) of the Constitution of India can always be imposed by means of law upon such a right to carry on trade, occupation or business. In this case, there is a law in the form of Bombay Police Act, 1951 and the Licensing Rules of 1960. Although there may be no direct provision in

relation to providing of parking places upon reading the provisions of the Bombay Police Act, 1951 and the Rules of 1960 as amended from time to time, in my judgment, there are sufficient provisions which enable the Authorities to advert to various aspects and parameters at the stage of consideration of an application seeking licence to commence a Video Game Parlour. The parking facility, is undoubtedly, a relevant consideration to be taken into account at the stage of deciding the application seeking licence of this nature.

18. In the present case, the only ground upon which the licence was declined on the first occasion was non-availability of independent parking facility. Thereafter, the Petitioner preferred Writ Petition No.3962 of 2012, in which the Petitioner made statements with regard to availability of parking facility, as also steps which the Petitioner shall take for the purposes of ensuring that such facility is available. In the light of such statements, this court observed that in case such facilities are provided by the Petitioner and necessary undertakings are furnished for ensuring compliance, there is no reason to deny licence to the Petitioner. This court further proceeded to observe that if the objection with regard to independent parking facility is the only objection on the basis of which the Authorities have declined the licence, then with the arrangement referred to in paragraph 4 of the judgment and order being complied with, "there

should not be any impediment in quashing and setting aside the orders under challenge". Accordingly, the orders declining the licence were quashed and set aside and the Authorities were directed to take final decision in two weeks as the Petitioner was ready and willing to furnish undertakings and make arrangements as stated in paragraph 4 of the judgment and order.

19. In the present case, there is no serious dispute that the Petitioner has made arrangement for parking facility. The material produced on record makes it clear that the Petitioner has made arrangement for parking of vehicles with the CIDCO Pay and Park facility, which is located just opposite the Petitioner's shop. Receipts produced by the Petitioner, no doubt, indicate that the Petitioner has reserved parking lot and paid fees only for a period of three months. Nevertheless, the Petitioner has furnished undertaking that he shall renew of such arrangement, so that the same is co-terminus with the term of the licence. The NOC dated 17th February 2010 issued by Senior Police Authority and endorsed by the Assistant Police Commissioner records at Clause (10) that CIDCO has provided independent pay and park facility opposite the building which houses Petitioner's shop and therefore there will be no obstructions on account of parking of vehicles. The NOC further records that the Petitioner's shop is not located in a densely populated area and upon

consideration of various other parameters, records that there is no objection for grant of licence to the Petitioner. The Petitioner has also produced on record yet another NOC dated 19th October 2011 issued by the Deputy Commissioner of Police (Traffic), which records that the Petitioner's shop was inspected in order to ascertain whether the Petitioner has indeed provided the facilities of the parking as per the assurances given by him to the court and as recorded in the judgment and order dated 4th September 2012. The NOC further records that upon inspection it was found that although the Petitioner does not have his own independent parking facility, he has made arrangement with the CIDCO Pay and Park facility, which is just opposite to his shop. Though parking fees have been paid for only three months, the Petitioner has submitted affidavit/undertaking regards renewal and accordingly the Traffic Department has no objection to the issuance of the licence.

20. All the aforesaid materials appear to have been completely ignored by Respondent No.1, at the stage of declining the licence to the Petitioner on the second occasion. The observations made by this court in its judgment and order dated 4th September 2012 to the effect that there should be no reason to deny licence to the Petitioner, in case the Petitioner furnishes necessary undertakings and ensures compliances, has also been ignored by Respondent No.1. Once there is material on

record, which establishes that the Petitioner has furnished necessary undertaking and ensured compliances, the observations made by this court could not have been lightly ignored. All these indicate that the relevant matters have been excluded from the consideration and the denial of licence is based upon no material or in any case based upon irrelevant and extraneous material. In such circumstances, the impugned order dated 1st November 2012, denying the Petitioner licence is unsustainable and is liable to be quashed and set aside.

21. Mr. Chandnani submitted that in case the matter is once again remanded to the Respondents for consideration, there is possibility that the licence is once again refused for extraneous considerations. He submitted that since the licence has been declined only on the ground of lack of parking facility and it was not even case of the Respondents at any stage that there was any other reason to decline the licence, upon such ground being demonstrably non-existent, no useful purpose would be served by remand. He submitted that on the contrary grave and irreparable prejudice will occasion the Petitioner, who has already been running from pillar to post from the year 2009 to secure a licence. The Petitioner was required to approach this court on no less than three occasions. Despite success on two occasions, the Respondents have obstinately declined the licence to the Petitioner. In such peculiar facts and

circumstances, he submits that this court should issue directions for grant of licence rather than once again leave the matter to the Authorities for fresh consideration.

22. Normally, a writ court upon quashing a decision of the Authority declining a licence issues directions to such Authorities to reconsider the application for grant of licence, in accordance with law. This is because licensing is the legitimate function of the Authorities. It is possible that apart from the reasons which may have not found favour with the court, there are other reasons and considerations, which the Authorities may deem it fit and proper to consider and decide. It is possible that there may be some other relevant aspects, which were not considered by the Authorities on the first occasion when the licence was declined. It is also possible that the Authorities may want to impose certain additional conditions, depending upon peculiar facts and circumstances of each case. However, this does not mean that the Authorities, upon a direction to reconsider application for grant of licence, can decline licence upon the very ground, which did not find favour with the Court in the first instance. This is precisely what has happened in the present case.

23. When faced with such a peculiar situation, this court is not powerless to direct the Authorities to issue licence. Article 226 has been

couched in a wide language so as to enable the High Court to reach injustice wherever it is found and to mould the reliefs to meet the peculiar situation, which may arise before it. The Supreme Court in the case of *Destruction of Public and Private Properties, In re Vs. State of Andhra Pradesh and others*¹, whilst analyzing situation in which a positive mandamus can be issued has referred to English as well as Indian judgments, which hold that writs can be issued to remedy particular situations, which arise before a court. A writ of mandamus may issue where a public authority has failed to exercise discretion conferred upon it by a statute or where exercise of discretion is based upon irrelevant considerations or by ignoring relevant considerations and materials or in such a manner as to frustrate a very object of conferment of discretion. In all such cases, High Court can compel the performance in a proper and lawful manner of the discretion conferred upon the a public authority, and in a proper case, in order to prevent injustice resulting to concerned parties, the court may itself pass an order or give directions which the government or the public authority should have been passed or given had it properly and lawfully exercised its discretion.

24. In the context of Commissioner of Customs declining refund of certain amounts despite directions of the High Court to consider the refund claims by taking into consideration essentiality certificates issued by

1 (2009) 5 Supreme Court Cases 212

ONGC. The Supreme Court in case of *RBF RIG Corporation, Mumbai Vs.*

*Commissioner of Customs (Imports), Mumbai*² observed thus:

19. Article 226 of the Constitution confers powers on the High Court to issue certain writs for the enforcement of fundamental rights conferred by Part-III of the Constitution or for any other purpose. The question, whether any particular relief should be granted under Article 226 of the Constitution, depends on the facts of each case. The guiding principle in all cases is promotion of justice and prevention of injustice.

20. In *Comptroller and Auditor-General of India v. K.S. Jagannathan*³, this Court has held:

“20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.”

2 (2011) 3 SCC 573

3 (1986) 2SCC 679,

21. In *Dwarka Nath v. ITO*⁴, this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts to reach injustice wherever it is found and to mould the reliefs to meet the peculiar and complicated requirements of this country.

22. In *Halsbury's Laws of England*, 4th Edn., Vol. I, para 89, it is stated that the purpose of an order of mandamus

“89. Nature of mandamus :- is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual”.

23. The High Court, in the present case, has moulded the relief in such a manner to meet out justice to an aggrieved person. It is not open to the subordinate Tribunal to examine whether a direction issued by the High Court under its writ powers was correct and refuse to carry it out as such amounts to denial of justice and destroys the principle of hierarchy of courts in the administration of justice.

24. This Court in [Bishnu Ram Borah v. Parag Saikia](#)⁵, has held:

“11. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Articles

4 AIR 1966 SC 81

5 (1984) 2 SCC 488

226 and 227 of the Constitution. We cannot but deprecate the action of the Board of Revenue in refusing to carry out the directions of the High Court. In *Bhopal Sugar Industries Limited v. ITO*⁶, the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him. The Court held that such refusal was in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on the hierarchy of courts. The facts of the present case are more or less similar and we would have allowed the matter to rest at that but unfortunately the judgment of the High Court directing the issue of a writ of mandamus for the grant of a liquor licence to Respondents 1 and 2 cannot be sustained.

25. We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court.

25. Therefore, the impugned order dated 1st November 2012 is quashed and set aside. In view of the aforesaid precedents and taking into consideration the peculiar facts and circumstances of the present case, the Respondents are directed to issue licence to the Petitioner for operating Video Game Parlour within a period of four weeks

⁶ (1961) 1 SCR 474

from today. It is clarified that the Respondents shall always be at liberty to impose additional conditions in the licence, over and above, usual terms and conditions for the purposes ensuring that the Petitioner not only provides, but continues to provide the parking facility during the term of the licence.

26. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M.S.Sonak, J.)