
(2008) 02 P&H CK 0177
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 5618 of 2007

Anil Kumar

APPELLANT

Vs

State of Haryana and others

RESPONDENT

Date of Decision : 20-02-2008

Acts Referred:

Citation : (2009) 1 RCR(Civil) 559

Hon'ble Judges : M.M.Kumar, J and T.P.S.Mann, J

Advocate : Mr. Akshay Bhan, Mr. Veneet Soni, Advocates.For the Respondent
Nos. 1 to 4, Ms. Palika Monga, AAG, Haryana., Advocates for appearing Parties

Judgement

M.M. Kumar, J.

1. Challenge in this petition filed under Article 226 of the Constitution is to the policy of allotment of chemist shops, dated 9.9.2005, and revised Condition No. 1 on 11/19.1.2007 (P2). It has further been prayed that the allotment made in favour of respondent Nos. 5 to 7 on 21.3.2007 be quashed with a direction to the respondent Nos. 1 to 4 to reframe the policy and make allotment of chemist shops on the basis of new policy.

2. Brief facts of the case are that on 3.3.2007, a public notice was published by the Civil Surgeon, Narnaul and District Health and Family Welfare Society, District Mohindergarh, Haryana respondent Nos. 3 and 4 respectively (Annexure P1). According to the aforementioned notice three shops, out of which one shop situated in the premises of Civil Hospital, Narnaul and two shops situated in the premises of Community Health Centre Mohindergarh, were advertised for opening/running as chemists shops. The allotment was to be made in the presence of the Deputy Commissioner, Narnaul, by the District Health and Family Welfare Society by draw of lots. The advertisement also mentioned that the shops of Community Health Centre Mohindergarh may fall vacant consequent upon the eviction of the old allottees of these shops in pursuance of the order dated 26.9.2006, passed by this Court in C.W.P. Nos. 15431 of 2005, 15901 of 2005, 1876 of 2005, 4584 of 2004 in CM No. 21488 of 2005 and 2975 of 2004 in

CM No. 21311 of 2005. The petitioner had applied for obtaining a copy of the policy along with demand draft of Rs. 100/-. It is claimed that complete policy was not supplied by respondent Nos. 3 and 4 to the petitioner, which is attached as Annexure P2. The petitioner applied for allotment of chemist shops at Community Health Centre Mohindergarh and General Hospital, Narnaul. The draw of lots was held on 23.1.2007 in the presence of the Chairman of the District Health and Family Welfare Society, District Mohindergarh and the draw of lots was held by respondent Nos. 3 and 4. Accordingly, respondent Nos. 5 and 6 were successful in getting Shop No. 1 and Shop No. 2 at Community Health Centre Mohindergarh, which were allotted to them and the name of respondent Nos. 8 and 9 were kept on the waiting list. The allotment was made to the shop at General Hospital, Narnaul in favour of respondent No. 7 and name of respondent No. 10 was kept in the waiting list. The claim of the petitioner is that Condition No. 1 as revised by the Government on 11/19.1.2007 is against the provisions of Article 14 of the Constitution because it provided that an applicant for allotment of chemist shop was required to engage a registered Pharmacist and the clause was to apply even to those applicants who themselves were Pharmacists.

3. In the written statement filed by the Civil Surgeon, Narnaul on behalf of respondent Nos. 1 to 4, it has been pointed out that the petitioner has obtained a copy of the policy dated 9.9.2005 along with revised Condition No. 1 vide letter dated 11/19.1.2007 well before the draw of lots. He participated and took chance. The present petition has been filed only after the petitioner has failed and after the maintainability of the writ petition and locus standi of the petitioner has, thus, been challenged.

4. The private respondent No. 5 in his separate written statement has stated that he is a qualified person, inasmuch as, he obtained Diploma in Pharmacy in May 1988 and a degree of Bachelor of Pharmacy in May 1993 (R1 and R2). It has further been claimed that he holds sufficient experience and has been duly given approval by the Directorate General Health Services, Haryana as manufacturing chemist, vide communication dated 29.3.1996 (R3). The copy of the experience certificate by M/s Jagsonpal Pharmaceuticals has been brought on record as Annexure R4. Respondent No. 5 also holds licence under Rules 61(2) and 61(3) of the Drugs and Cosmetics Act, 1940 (for brevity, 'the Act').

5. A separate written statement on behalf of respondent Nos. 6 to 8, has also been placed on record defending the placement of their names in the waiting list.

6. Mr. Akshay Bhan and Mr. Veneet Soni, learned counsel for the petitioner have argued that the policy consisting allotment of chemist shops, dated 9.9.2005, is liable to be declared as illegal because no rent or other charges have been disclosed or fixed by the respondents. According to learned counsel the policy is vague and the allotment by draw of lots amounts to arbitrary and colourable exercise of power. They have maintained that no qualification for allotment of chemist shops has been prescribed. They have further submitted that even a nonqualified person could seek allotment of the chemist shop, which would be

against the basic requirements since such a person would not be able to dispense medicines.

7. Ms. Palika Monga, learned State counsel has submitted that once the petitioner has participated in the selection process and taken chance then he cannot challenge the same very process merely because he did not succeed. She has maintained that the petitioner has obtained copies of the allotment policy dated 9.9.2005 and the revised Condition No. 1 of the said policy from the office of respondent No. 4 well before draw of lots, despite that he had applied for allotment of shops on 19.1.2007. He could have challenged the criteria and the policy before the draw of lots. The failure to challenge before the draw of lots and active participation of the petitioner would show that the petitioner had taken a chance and has failed. Learned State counsel has pointed out that in these circumstances the principle of estoppel would be fully applicable. According to the learned counsel, it is no longer the policy of the respondents to allot the chemist shop only to qualified Pharmacists and that the shop can be allotted even to a nonpharmacist with the stipulation that such an allottee has to engage a qualified Pharmacist subject to number of other conditions. She has drawn our attention to Rule 64 Drugs and Cosmetics Rules, 1945 (for brevity, 'the Rules'), which have been framed in pursuance to Sections 6(2), 12, 33 and 33N of the Act, and argued that a license to sell, stock or offer for sale or distribution of drugs is not to be granted to any person unless the authority empowered to grant the licence is satisfied that the premises in respect of which the license is to be granted or renewed are adequately equipped with proper storage, accommodation for preserving the properties of the drugs and are in the charge of a person competent in the opinion of the licencing authority to supervise and control. Referring to the clause (ii) of the second proviso to subrule (2) of Rule 64 of the Rules, the learned State counsel has pointed out that the expression in the charge of a competent person" has been defined to be a registered Pharmacist or a person who has passed Matriculation or equivalent examination with four years experience in dealing with the sale of drugs or a degree holder of a recognised university with one year experience in dealing with the drugs. Justifying the policy dated 9.9.2005, which has been duly revised by letter dated 11/19.1.2007, learned State counsel has submitted that no provisions of either the Act or the Rules have been violated. She has drawn our attention to policy dated 9.9.2005 (Annexure P2) and amendments made in Condition No. 1.

8. In the end, learned State counsel has submitted that further amendment in the policy has been made by letter dated 30.11.2007 by including certain pre conditions and eligibility condition of the policy dated 9.9.2005 as amended on 11/10.1.2007, which is to apply prospectively.

9. After hearing learned counsel for the parties and perusing the record with their able assistance, we are of the considered view that this petition is liable to be dismissed on the short ground of estoppel. It is admitted position that the petitioner has participated in the selection process initiated in pursuance to

public notice dated 3.3.2007. Merely because the petitioner has remained unsuccessful would not mean that he becomes entitled to challenge the selection on the basis of the argument that the policy of allotment of chemist shops, dated 9.9.2005 suffers from various legal lacunae. It has come on record that the petitioner had obtained a copy of the policy dated 9.9.2007 alongwith the revised Condition No. 1 well before the draw of lots on 19.1.2007. The draw of lots were held on 23.1.2007. The petitioner preferred to participate and has failed. It is in the aforementioned circumstances that the principle of estoppel would apply, as has been held by Hon"ble the Supreme Court in the cases of Madan v. State of J&K, (1995) 3 SCC 486 and Chander Parkash Tiwari v. Shakuntla Shukla, (2002) 6 SCC 127 and the latest judgment following the view taken in Madan Lal's case (supra), namely, Dhananjay Malik v. State of Uttranchal, 2008(2) SCT 659 : 2008(3) RAJ 249 : (2008)4 SCC 171.

10. Even otherwise, we are not impressed with the argument that the policy of the State, dated 9.9.2005, suffers from any legal infirmity merely because it confines the allotment of chemist shops to a duly qualified Pharmacist who has five years experience in Pharmacy because firstly that clause was duly amended and according to the revised condition, the applicant is required to engage a registered Pharmacist who could be applicant himself or could be whole time employee of an applicant. Therefore, the condition that Pharmacist himself should alone be the applicant has been modified. The new and the revised condition, as per letter dated 11/19.1.2007 (P2) reads as under :

"Applicant must engage registered pharmacist(s) who could be applicant himself or could be whole time employee of the applicant. The number of such registered pharmacists should be one, two and three in the case the shop(s) is/are intending or required to have opening hours between 6 AM to 2 PM of the same day, between 6 AM to 8 PM or even upto 10 PM of the same day, and between 6 AM till 6 AM of the next day i.e. 24 hours respectively, so that sale/supply of the drugs could be made to the patients by or under the supervision of the registered pharmacist for all such time the shop remains open for this purpose. This condition shall be applicable to all the applicants irrespective of their name/nomenclature/status etc and shall be applicable in respect of the shops which are lying vacant at present or which may fall vacant consequent upon eviction of old allottees on expiry of the period of old allotment or on termination of the old allotment due to any reason, whatsoever." (underlining for emphasis)

11. The revision in Condition No. 1 of the policy dated 9.9.2005 is in accordance with the provisions of Rules 64, 65(1), 65(2) and 65 (19), which reads thus :

"64. Conditions to be satisfied before a licence in Form 20, 20B, 2017, 20 G, 21 or 21B is granted or renewed.

(1) A licence in Form 20, 20B, 20F, 20G, 21 or 21B to sell, stock, exhibit or offer for sale or distribute drugs shall not be granted or renewed to any person unless the authority empowered to grant the licence is satisfied that the premises in

respect of which the licence is to be granted or renewed are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and are in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs :

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xxx xxx xxx xxx

Explanation. For the purpose of this rule the term `Pharmacy" shall be held to mean to include every store or shop or other place (1) where drugs are dispensed, that is, measured or weighed or made up and supplied; or (2) where prescriptions are compounded; or (3) where drugs are prepared; or (4) which has upon it or displayed within it, or affixed to or used in connection with it, a sign bearing the word or words "Pharmacy", "Pharmacist", "Dispensing Chemist" or "Pharmaceutical Chemist"; or (5) which, by sign, symbol or indication within or upon it gives the impression that the operations mentioned at (1), (2) and (3) are carried out in the premises; or (6) which is advertised in terms referred to in (4) above.

(2) In granting or renewing a licence under subrule (1) the authority empowered to grant it shall have regard

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xxx xxx xxx xxx xxx

Provided that the licensing authority may refuse to grant or renew a licence to any applicant or licensee.....

Provided further that in respect of an application for the grant of a licence in Form 20B or Form 21B or both, the licensing authority shall satisfy himself that the premises in respect of which a wholesale licence is to granted or renewed are

(i) of an area of not less than ten square meters; and

(ii) in the charge of a competent person, who

(a) is a Registered Pharmacist, or,

(b) has passed the matriculation examination or its equivalent examination from a recognised Board with four years" experience in dealing with sale of drugs, or

(c) holds a degree of a recognised University with one year"s experience in dealing with drugs :

Provided also that,

(i) in respect of an application for the grant of a licence in Form 20 or Form 21 or both, the licensing authority shall satisfy itself that the premises are of an area of not less than 10 square meters, and

(ii) in respect of an application for the grant of a licence

(a) In Form 20 or Form 21 or both, and

(b) In Form 20 B or Form 21 B or both,

the licensing authority shall satisfy itself that the premises are of an area not less than 15 square meters :

Provided also that the provisions of the preceding proviso shall not apply to the premises for which licences have been issued by the licensing authority before the commencement of the Drugs and Cosmetics (1st Amendment) Rules, 1997.

(3) Any person who is aggrieved by the order passed by the licensing authority in subRule (1) may, within 30 days from the date of receipt of such order, appeal to the State Government and the State Government may, after such enquiry into the matter as it considers necessary and after giving the appellant an opportunity for representing his views in the matter, make such an order in relation thereto as it thinks fit. (underlining for emphasis)

"65. Condition of licences. Licences in Forms 20, 20A, 20B, 20 F, 20G, 21 and 21B shall be subject to the conditions stated therein and to the following general conditions

(1) Any drug shall, if compounded or made on the licensee's premises, be compounded or made by or under the direct and personal supervision of a registered Pharmacist.

(2) The supply, otherwise than by way of wholesale dealing of any drug supplied on the prescription of a Registered Medical Practitioner shall be effected only by or under the personal supervision of a registered Pharmacist.

(3) to (18) xxx xxxx xxx

(19) The supply by retail of any drug in a container other than the one in which the manufacturer has marketed the drug, shall be made only by dealers who employ the services of a registered Pharmacist and such supply shall be made under the direct supervision of the registered Pharmacist in an envelope or other suitable wrapper or container showing the following particulars on the label

(a) name of the drug,

(b) the quantity supplied,

(c) the name and address of the dealer.

(20) & (21) xxx xxx xxx "

12. A close scrutiny and examination of Rule 64 of the Rules would reveal that certain conditions have been laid down with regard to premises which are required to sell, stock, exhibit or offer for sale or distribute drugs. Likewise qualifications and requirements have also been laid down in respect of a person

who is granted license or whose license is renewed. In the present case the dispute is concerning qualifications and requirements. The second proviso to Rule 64(2), inter alia, provides that the licensing authority while granting or renewing the licence in Form 20B or/and 21B is required to satisfy itself that the premises to house pharmaceuticals is not less than ten square meters. It is mandate of clause (ii) of the second proviso that licensing authority has to ensure that incharge of such a pharmaceutical is a competent person. He must be a registered pharmacist or has passed Matriculation examination or its equivalent examination from a recognised Board with four years' experience in dealing with sale of drugs or he holds a degree of a recognised university with one year's experience of dealing with drugs. The third proviso in addition also provides relaxed parameters regarding grant or renewal of licence in Form 20 or Form 21 and Form 20B and 21B. In that case different norms for area have been laid down.

13. A perusal of Rule 65 of the Rules makes it further evident that licences in various forms could be issued subject to certain conditions. The presence of registered pharmacist has been made mandatory if any drug is to be compounded or made on the licensee's premises. Even the supply on the prescription of Registered Medical Practitioner has to be effected only by or under the personal supervision of such a registered pharmacist. The position is the same when the supply is to be made by retail sale of any drug. Therefore, the rule clearly postulates that licensee can be a person different than the pharmacist although pharmacist himself can be licensee.

14. In the light of the aforementioned Rules 64 and 65 of the Rules, if the factual position of the present case is examined then no doubt is left that the policy dated 9.9.2005 and the amendment carried out on 11/19.1.2007 [P2 (Colly)] are consistent with the requirement and spirit of the Rules. It is further appropriate to notice that Condition No. 1 in the policy dated 9.9.2005 confining the eligibility only to qualified pharmacist has been widened by the notification dated 11/19.1.2007, which has already been reproduced in para 10 above. The revision of Condition No. 1 has been made in pursuance to the direction issued by a Division Bench of this Court on 26.9.2006 in C.W.P. No. 15431 of 2005 (Lalit Kumar and another v. The State of Haryana and another). According to the direction, the respondents were required to reconsider the policy/eligibility conditions by keeping in view the provisions of the Act and the Rules. The directions issued by this Court on 26.9.2006, reads thus :

".....In these circumstances, we dispose of the present writ petition with a direction to the Financial Commissioner and Principal Secretary to Government of Haryana, Health Department to reconsider the policy decision regarding opening of chemist shops in the Civil Hospital Premises/dispensaries in the State of Haryana and the eligibility conditions for the applicants, seeking allotment of the aforesaid shops. The aforesaid reconsideration shall be completed within a period of one month from the date a certified copy of this order is received. After

framing/reconsideration of the aforesaid policy, fresh proceedings for allotment/running of the chemist shops shall be initiated and completed within a period of one month thereafter....."

15. For the reasons aforementioned, this petition fails and the same is dismissed.