

(2016) 04 GAU CK 0011
In the Gauhati High Court
Case No : W.P (C) No. 193 (K) of 2015

Dr. Pangjung Ao

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 08-04-2016

Acts Referred:

Citation : (2016) 3 GauLT 725

Hon'ble Judges : L.S. Jamir, J.

Bench : Single Bench

Advocate : Mr. A. Zho, Mr. Moa Jamir and Ms. Julian Sitlhou, Advocates, for the Appellant; Mr. Tongpok Pongener and Mr. ThibaPhom, Special Counsel, for the Respondent

Final Decision : Allowed

Judgement

L.S. Jamir, J.—By this writ petition, the petitioner is challenging the letter dated 21.09.2015. show cause notice dated 28.09.2015 are the order dated 07.10.2015 on the ground that the issuing authority" has no jurisdiction under the Drugs and Cosmetics Act, 1940.

2. Heard Mr. A. Zho, learned counsel for the petitioner. Also heard Mr. Tongpok Pongener, learned special counsel appearing for the State respondents.

3. Mr. A. Zho. learned counsel for the petitioner submits that the petitioner is a license holder for Medicine Whole seller/Distributor and he has been in the business for many years. While the petitioner was doing business at Dimapur. he was served with a letter dated 21.09.2015 issued by the respondent No. 3/ Assistant Drugs Controller, Dimapur. Nagaland asking the petitioner to submit detail invoice of purchase and sale of cough syrup containing codeine along with the company name/name of the product immediately from the period April. 2014 to September, 2015 on or before 25.09.2015. The petitioner could not submit the required information within the last date fixed as there was death of time and the record pertaining to more than one year could not be collected within a short

period of four days. Therefore, the respondent Nos. 2 and 3 again issued a show cause notice dated 28.09.2015 stating that the petitioner had committed offence under Section 18B P/u, Section 27(d) and Section 22(3) of Drugs and Cosmetics Act, 1940 (hereinafter referred to as "the Act of 1940") and Rules 1945 P/u Section 28(A) and Circular dated 17.09.2012 of the State Drugs Control Authority, Government of Nagaland directing the petitioner to show cause as to why action should not be taken against him within one week. The petitioner accordingly submitted reply to the show cause notice on 05.10.2015 to the respondent No.3 stating that the time for furnishing invoices and sale of cough syrup containing codeine along with cash memo for the period April, 2014 to September, 2015 was too short and that an extension of one month's time was requested. After receipt of the reply dated 05.10.2015, the respondent Nos. 2 and 3 again issued an order dated 07.10.2015 granting five days time to furnish all the necessary documents of purchase and sales record/register as per Rules 65 of the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as "the Rules of 1945") as required under Rule 65 (6) from the date of issue of the notice. It was further stated in the order that in the event of failure to comply with the directives, the petitioner's business would be closed and legal action under appropriate sections of the Act of 1940 and Rules, 1945 shall be proceeded without any further notice. Therefore, having no other option, the petitioner has approached this Court.

4. M. A. Zho, learned counsel for the petitioner submits that the respondent Nos. 2 and 3 has no power or jurisdiction to issue the impugned show cause notice as well as the impugned order under the Act of 1940. It is submitted that under the Act of 1940, the power is vested with the Drugs Inspector and not with any other officials. He submits that in respect of Dimapur District, the present Inspector of Drugs and Cosmetics is one Shri Martemjen. It is also submitted that Rule 65 (6) of the Rules of 1945 have no relevance to the present case inasmuch as the said Rules relates to production of record/registers on demand being made by the Drugs Inspector duly appointed under the Act. Learned counsel for the petitioner also submits that Section 18B, 22 (3), 27(d) and 28(A) of the Act of 1940 has also no relevance in the present case inasmuch as Section 18B relates to maintenance of record and furnishing of information in terms of license issued by the authority". Also, Section 22 (cca) of the Act of 1940 relates to the power of Drugs Inspector who are duly appointed under the Act to require any person to produce any record, register or other documents relating to the manufacture for sale or for distribution, stocking, exhibition for sale, offer for sale or distribution of any drug or cosmetic in respect of which he has reason to believe that the offence has been committed. Further, Section 27(d) of the Act is also irrelevant as the same relates to penalty for manufacture, sale of drugs in contravention of the chapter. In the present case in hand, he submits, that there is no allegations of manufacture or sale of drugs against the petitioner in contravention of the law. Further, Section 28(A) of the Act has little relevance as the same relates to penalty in a case where anybody fails to keep proper record and does not

disclose information and the penalty is for a term of one year and fine of Rs. 20,000/-. It is submitted that the respondent Nos. 2 and 3 have acted illegally inasmuch as the first letter dated 21.09.2015 and the last letter dated 07.10.2015 were issued when the petitioner had asked for extension of time for a period of one month to produce the record as demanded.

It is also submitted that Section 32 of the Act of 1940 provides that no prosecution shall be instituted except by an Inspector, any gazetted officer of the Central Government or a State Government authorised in writing by the Central Government or the State Government. the person aggrieved or recognised consumer association. He further submits that in the present case, no Drugs Inspector has instituted any case for prosecution against the petitioner and therefore, the closure of the petitioner's business is unwarranted nor is it provided under the Act. He also submits that under Section 32(2) it is provided that no Court inferior to that of a Session Court can try offence punishable under Chapter 4 of the Act of 1940. Therefore, the threat issued by the respondent Nos. 2 and 3 to close down the business of the shop is wholly illegal and is not sustainable in law. It is also submitted that Section 22(3) of the Act of 1940 provides for an offence under Chapter 4 whereby the offender shall be punishable with imprisonment which may extend to three years or with fine, or with both. He, therefore, submits that there is no provision under the Act of 1940 for closure of the petitioner's business as contemplated by the respondent Nos. 2 and 3.

5. Learned counsel for the petitioner submits that in the present case, the petitioner has committed no offence against any provision under the Act of 1940 and the petitioner had only requested for a reasonable period of one month's time in order to produce all required documents as required by the respondent Nos. 2 and 3 though they have no authority under the Act of 1940 to do so. Therefore, instead of considering the request of the petitioner, the respondent Nos. 2 and 3 had proceeded to impose penalty by closure of the petitioner's business. In that view of the matter, learned counsel for the petitioner submits that the impugned letter dated 21.09.2015, show cause notice dated 28.09.2015 and order dated 07.10.2015 should be quashed and set aside inasmuch as the same were issued without any authority under the Act of 1940.

6. Mr. TongpokPongener, learned special counsel for the State of Nagaland submits that the Government of Nagaland, Health and Family Welfare Department by Notification dated 21.08.2007 has notified Division of three Zones under the State Drugs Control Wing. He submits that Kohima District, Wokha District, Phek District and Kiphire District falls under Kohima Zone with Headquarter at Kohima. Mokokchung District, Tuensang District, Zunheboto District and Long-leng District Falls under the Mokokchung Zone with Headquarter at Mokokchung and Dimapur District, Mon District and Peren District falls under Dimapur Zone Headquarter at Dimapur. Each of the three zones is supervised by an Assistant Drugs Controller and the District of Kohima, Wokha,

Phek. Mokokchung, Tuensang, Zunheboto, Dimapur and Mon have Drugs Inspectors. However, in respect of Kiphire, Long-leng and Peren Districts there are no Drugs Inspector. Therefore, in respect of the said three districts, the Zonal Officer i.e the Assistant Drugs Controller functions as Drugs Inspector. He also submits that the Chief Medical Officer (CMO) of the district functions as Ex-Officio Controlling Authority of the Drugs Control Wing in the respective district.

He submits that the Directorate of Health and Family Welfare, Nagaland had issued a circular dated 17.09.2012 in order to check the rampant misuse and abuse of some pharmaceutical products in the State. By the said circular, directions were issued to all Pharmaceutical Stockiest. Distributors and Whole sellers to comply with the terms and conditions in their supply chain which has been indicated in the said circular. He also submits that the respondents has issued two circulars both dated 17.09.2012 laying down terms and conditions to be followed by the Whole sellers and Retailers within the State of Nagaland for purchase and sales of all restricted pharmaceutical products. It is submitted that despite the circulars dated 17.09.2012. the petitioner Has been carrying out his business in blatant violation of the same and the petitioner has never submitted the quarterly purchase and sale records to the District Drugs Regulator) Officers. Therefore, the petitioner was served with a letter dated 21.09.2015 asking him to submit detailed invoices of purchase and cough syrup containing codeine phosphate along with the Company name/name of the product immediately for the period April. 2014 to September. 2015 on or before 25.09.2015. As the petitioner did not comply with the letter dated 29.09.2015. the respondent Nos. 2 and 3 were compelled to issue show cause notice dated 28.09.2015 giving the petitioner an opportunity to show cause within one week from the date of notice as to why action should not be taken against him. After receipt of the reply by the petitioner to the show cause notice dated 28.09.2015, the respondents found that the petitioner was resorting to dilatory" tactics to frustrate the due process of law and therefore the respondents were compelled to issue the order dated 07.10.2015. He also submits that as the final decision on the matter lies with the Licensing Authority, the respondent Nos. 2 and 3 have submitted a report on 19.10.2015 indicating the illegalities committed by the petitioner for taking appropriate action.

7. Learned special counsel for the State of Nagaland submits that Rule 51 of the Rules of 1945 clearly provides that the power of inspection by the Drugs Inspector is subject to the instructions of the Controlling Authority and the respondent Nos. 2 and 3 are the Controlling Authority. He, therefore, denies the allegations of the petitioner that the power to issue order is vested solely with the Drug Inspector and not with any other officials. As the respondent Nos. 2 and 3 are the Controlling Authority of the Drugs Inspector they are empowered to exercise the power and functions as provided under the Act of 1940. He also submits that under Section 18B of the Act of 1940. the respondents are empowered to compel the furnishing of records, register and other documents prescribed under the rules. Therefore, as the respondents, more particularly, the

respondent Nos. 2 and 3 are empowered by the Act of 1940, they had issued the directions to the petitioner to furnish records, register and other documents to take appropriate action in carrying out the purpose of the Act. In that view" of the matter, learned counsel submits that there is no illegality in the impugned letter dated 21.09.2015, show cause notice dated 28.09.2015 and the impugned order dated 05.10.2015 inasmuch as the respondent Nos. 2 and 3 being the Controlling Authority has acted within the provision of the Act of 1940 and therefore the present writ petition should be dismissed.

8. I have considered the submissions forwarded by the learned counsel for the parties.

9. Under the Act of 1945, Section 21 provides for the appointment of Inspector. The Drugs Inspectors are to be appointed by the Central Government or a State Government by notifying in the Official Gazetted to appoint such person as it thinks fit having prescribed qualifications to be Inspector for such area as may be assigned to them by the Central Government or the State Government as the case may be. The powers of the Inspectors under Section 22(cc) and Section 22 (cca) are also quoted herein below:-

"(cc) examine any record, register, document or any other material object found 2 [with any person, or in any place, vehicle, vessel or other conveyance referred to in clause (c)], and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the Rules made thereunder;]

"(cca) require any person to produce any record, register, or other documents relating to the manufacture for sale or for distribution, stocking, exhibition for sale, offer for sale or distribution of any drug or cosmetic in respect of which he has reason to believe that an offences under this Chapter has been, or is being, committed."

10. For violation of any provision under Chapter 4 of the Act of 1940, Section 32 provides for cognizance of such offences. The same is also reproduced herein below :-

"32. Cognizance of offences?

(1) No prosecution under this Chapter shall be instituted except by?

(a) an Inspector; or

(b) any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government by a general or a special order made in this behalf by that Government; or

(c) the person aggrieved; or

(d) a recognised consumer association whether such person is a member of that

association or not.

(2) Save as otherwise provided in this Act, no Court inferior to that of a Court of Session shall try all offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter."

11. Coming to the Rules of 1945, Rule 49 provides for the qualification of Inspector. Rule 49A provides for qualification of a Licensing Authority and Rule 50A provides for qualification of Controlling Authority. Further, Rule 50 defines the Controlling Authority. Rule 50 and Rule 50A are also reproduced herein-below :-

50. Controlling Authority-

(1) All Inspectors appointed by the Central Government shall be under the control of an officer appointed in this behalf by the Central Government.

(2) All Inspectors appointed by the State Government shall under the control of an officer appointed in this behalf by the State Government.

(3) For the purposes of these rules an officer appointed by the Central Government under sub-rule (1), or as the case may be, an officer appointed by the State Government under sub-rule (2) shall be a controlling authority.

50A. Qualification of a Controlling Authority-

(1) No person shall be qualified to be a Controlling Authority under the Act unless-

(i) he is a graduate in Pharmacy or Pharmaceutical Chemistry or in Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law; and

(ii) he has experience in the manufacture or testing of drugs or enforcement of the provisions of the Act for a minimum period of five years:

3 [Provided that the requirements as to the academic qualification shall not apply to those I inspectors and Government Analysts who were holding those positions on the 12th day of April, 1989] (???)

12. From a consideration of the Act of 1940 and the Rules of 1945, a Drugs Inspectors having the prescribed qualifications may by notification in the official gazette be appointed by the Central Government ora State Government. Further, Rule 50 (3) provides how a Controlling Authority will have to be appointed under the Act.

In the present case in hand, apart from the Notification dated 21.08.2007 by which the Division of three Zones under the State Drugs Control Wing has been

notified, the respondents have failed to show any notification issued by the State Government appointing the Drug Inspector or for that matter the Controlling Authority. In the absence of such notification, this Court is of the considered opinion that the respondent Nos. 2 and 3 has no authority to act or to exercise any power provided under the Act of 1940 as well as the Rules of 1945.

This Court has considered the submissions made by the learned special counsel for the State respondents that the respondent Nos. 2 and 3 are the Controlling Authority and that the Drug Inspector is under the control of the Controlling Authority. The submissions of the learned special counsel for the State respondents would hold good had there been an order appointing the respondent Nos. 2 and 3 as the Controlling Authority as prescribed under Rule 50 with the qualifications as prescribed under Rule 50A of the Rules of 1945. In the present case, they have miserably failed to show any notification/order being issued by the State Government appointing them as Controlling Authority. It is also to be noted that the Act of 1940 has penal consequences. Therefore, the respondents while exercising powers under the Act of 1940 has to be specifically notified allowing them to exercise such power by the State Government. For that matter, even the appointment of Drugs Inspector will have to be done strictly in terms of Section 21 of the Act of 1940. It appears that there is no notification issued by the State Government either appointing the Drug Inspector or the Controlling Authority under the Act or Rules. In absence of such notification, this Court is of the considered opinion that the respondent Nos. 2 and 3 have acted illegally while issuing the impugned letter dated 21.09.2015, show cause notice dated 28.09.2015 and the order dated 07.10.2015.

13. Another important point of note is that Section 32 of the Act of 1940 clearly provides for taking cognizance of offence committed under Chapter 4 of the Act of 1940. There is no provision in the Act by which the closure of business of an offender has been prescribed. Therefore, the impugned order dated 07.10.2015 by which the petitioner was intimated for closure/sealing of Firm/Shop is also unfounded and is held to be illegal.

14. In view of the discussions made herein above and on consideration of the facts and circumstances of the case, the impugned letter dated 21.09.2015, show cause notice dated 28.09.2015 and the order dated 07.10.2015 are held to be illegal and the same are accordingly set aside and quashed.

15. Writ petition is allowed.

16. No cost.