
(2013) 10 BOM CK 0131
In the Bombay High Court
Case No : Writ Petition No. 8529 of 2013

Namdev Genba Parthe

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-10-2013

Acts Referred:

Citation : (2013) 6 ABR 792 : (2014) 1 MhLj 266

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : G.S. Hegde instructed by and Ms. P.M. Bhansali, for the Appellant;
P.G. Sawant AGP for State, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sonak, J.—Rule. With the consent of the learned counsel for the parties, Rule is made returnable forthwith. By this petition under Articles 226 and 227 of the Constitution of India petitioner challenges the following orders:

(a) An order dated 31.08.2012 passed by the Assistant Commissioner (Zone-1) Mumbai, Food and Drugs Administration - respondent no. 2 declining the licence to the petitioner for a sale of retail drugs from the premises bearing photopass no. 0113030 situate at 188, Ambedkar Nagar, T.L. Vaswani Marg, Cuffe Parade, Mumbai 400005, hereafter referred to as "the said premises"; and

(b) An order dated 17.04.2013 passed by the Minister (Food and Drugs Administration), State of Maharashtra (respondent no. 1), rejecting appeal against aforesaid order dated 31.08.2012.

Aforesaid two orders shall for the purposes of this petition be referred to as impugned orders.

2. In order to appreciate the challenges raised by the petitioner, at the very outset reference is required to be made to the following two circumstances:

(A) From out of the said premises, one Mr. Ravindra Dattatray Gaikwad

(Ravindra) a qualified Pharmacist was operating a medical store under the name and style of "Dattakrupa Medical & General Stores" in pursuance of licence issued by respondent no. 2 in Form 20, 20C and 21 appended to the Drugs and Cosmetics Rules, 1945 (said Rules). The authorities upon satisfaction that Ravindra was involved in the unauthorised large scale sale of Rexcof Cough Syrup containing a Codeine Phosphate from the said premises, had cancelled his licence by order dated 02.01.2012 made effective from 16.02.2012. It was submitted that a Codeine Phosphate is substance which has potential to induce addiction; and

(B) On 13.02.2012, i.e., even prior to the cancellation of licence taking effect, one Sushma Lahote applied for licence to commence a medical store from the said premises. Sushma Lahote placed reliance upon a "Leave and Licence Agreement" from Ravindra in respect of said premises. The application for licence was refused by the respondent Nos. 1 and 2 inter alia on the ground that Sushma Lahote was nothing but a "front" for Ravindra. Sushma Lahote did not carry the matter any further.

3. The petitioner applied for licence under the said Rules to respondent No. 2 on 16.07.2012. In compliance with the principles of natural justice as well as in pursuance of powers vested by him under Rules 64 and 65A of the said Rules, respondent No. 2 issued show cause notice dated 14.08.2012 to the petitioner, requiring the petitioner to show cause as to why his application be not rejected upon the prima facie grounds referred to in the show cause notice.

4. The petitioner submitted his response on 21.8.2012 contending that he was in no manner related to or concerned with Ravindra. The said premises were genuinely taken on leave and licence basis from Ravindra simply to avail the goodwill associated with the premises and because the said premises, otherwise meet with the prescribed specifications.

5. By order dated 31.8.2012, Respondent No. 2 declined licence to the petitioner. This order has been upheld by the appellate authority (respondent no. 1) on 17.4.2013. The rejection is primarily upon the following grounds:

(a) The petitioner's response to show cause notice is not satisfactory.

(b) There was no material produced on record by the petitioner to establish that Ravindra was in fact owner of said premises and had authority to grant the said premises on leave and licence basis. In fact there was material on record to suggest that premises were owned by one Shakuntala Jagdale.

(c) Ravindra, from whom the petitioner has purported to take premises on leave and licence basis, was only the proprietor of "Dattakrupa Medical & General Stores" and not the said premises.

(d) The licence issued to Ravindra in respect of "Dattakrupa Medical & General Stores" to operate from very same premises had been cancelled on grounds of unauthorised large scale sale of drugs and breaches of the provisions of the

Drugs and Cosmetics Act 1940 and Rules made thereunder.

(e) Taking into consideration the entire case history and antecedents, it is reasonable to conclude that the petitioner is only a "front" for Ravindra and in case licence is issued, possibility of unauthorised sale of drugs cannot be ruled out.

6. Mr. G.S. Hegde, learned counsel appearing for the petitioner made the following submissions in support of this petition:

(A) That the findings recorded and the conclusions arrived at in the impugned order are perverse and accordingly warrant interference in exercise of judicial review;

(B) There was absolutely no material on record to warrant any finding that the petitioner was a "front" for Ravindra or that this was an indirect attempt on the part of Ravindra to recommence the medical store, despite cancellation of licence. The findings/conclusions are therefore in the nature of conjectures and surmises;

(C) The Minister (Food and Drug Administration) in virtually identical circumstances has allowed Appeal No. 256 of 2012 in the case of M/s. Sana Chemist. Respondent No. 2 has accepted and perhaps implemented this decision. In the circumstances, there is no reason for the respondents to adopt an unequal yardstick in petitioner's case. This infringes petitioner's fundamental rights as guaranteed by Article 14 and 19(1)(g) of the Constitution of India.

7. Mr. P.G. Sawant, learned AGP appearing for the respondents pointed out that the respondents after afford of adequate opportunity to the petitioner, have returned concurrent findings of fact. Such findings are based upon cogent material on record. The petitioner is merely a "front" for Ravindra, who is making every attempt to achieve indirectly what the earlier cancellation of licence has condemned him to suffer directly. The scope of judicial review in such matters is extremely limited and in the facts and circumstances of the present case, the petitioner deserves no relief.

8. In order to evaluate the rival contentions, a brief reference to the licencing provisions contained in the Drugs and Cosmetics Act, 1940 and Rules made thereunder may not be out of place.

9. The Act was enacted to regulate import, manufacture, distribution and sale of drugs and cosmetics. The State has assumed responsibility in this regard in order to ensure supply of safe and potent drugs to a populace susceptible to ailments and largely ignorant of health hazards. The paramount purpose of the enactment is to set in motion a vigilant medical watch over proper protection of drugs and medicines and the verification of the expiry of their life and the spuriousness of the products Swantraj and Others Vs. State of Maharashtra, .

10 In exercise of powers conferred by Sections 6, 12, 33 and 33N of the Drugs

and Cosmetics Act (said Act), the Central Government has framed the Drugs and Cosmetics Rules, 1945 (said Rules). Rule 64, 65A and 67C which provide for licensing, read as follows:

Rule 64. Conditions to be satisfied before a license in [Form 20, 20-B, 20-F, 20-G, 21 or 21 B] is granted [or renewed].

(1) A license in Form 20, 20-B, 20-F, 20-G, 21 or 21-B 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 license is satisfied that the premises in respect of which the license is to be granted or renewed are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the license 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:

Provided that in the case of a pharmacy a license in Form 20 or 21 shall not be granted or renewed unless the licensing authority is satisfied that the requirements prescribed for a pharmacy in Schedule N have been complied with:

Provided further that license in Form 20-F shall be granted or renewed only to a pharmacy and in areas where a pharmacy is not operating, such license may be granted or renewed to a chemist and druggist.

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 license under sub-rule (1) the authority empowered to grant it shall have regard

(i) to the average number of licenses granted or renewed during the period of 3 years immediately preceding, and

(ii) to the occupation, trade or business ordinarily carried on by such applicant during the period aforesaid:

Provided that the licensing authority may refuse to grant or renew a license to any applicant or licensee in respect of whom it is satisfied that by reason of his conviction of an offence under the Act or these rules, or the previous cancellation or suspension of any license granted or renewed thereunder, he is not a fit person to whom a license should be granted or renewed under this rule. Every

such order shall be communicated to the licensee as soon as possible:

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

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

(B) In Form 20 B or Form 21B 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 licenses 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 sub-rule (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.

Rule 65A. Additional information to be furnished by an applicant for liscence or a licensee to the licensing authority. The applicant for the grant of a license or any person granted a license under this Part shall, on demand, furnish to the licensing authority, before the grant of the license or during the period the license is in force, as the case may be, documentary evidence in respect of the ownership of occupation or rental or other basis of the premises, specified in the application for license or in the license granted, constitution of the firm, or any other relevant matter which may be required for the purpose of verifying the correctness of the statements made by the applicant or the licensee, while

applying for or after obtaining the license, as the case may be.

Rule 67 C. Form of licences to sell drugs - A licence to sell, stock, exhibit or offer for sale or distribute Homeopathic medicines by retail or by wholesale shall be issued in Form 20C or Form 20D as the case may be.

11. Analysis of the Rules would indicate that licence to commence a medical store shall not be granted unless the licencing authority is of the opinion that the premises in respect of which the licence is applied are in charge of a person competent to supervise and control the sale, distribution and preservation of drugs. For this purpose the competence of the applicant who professes to assume charge over the premises is a valid and relevant consideration. Further from the phraseology employed in the rule, the licencing authority is enjoined to ensure that de facto charge of the premises is not with a person who has already been adjudged as incompetent to supervise and control the sale, distribution and preservation of drugs. Such incompetence may arise on account of a host of factors including, but not limited to previous conviction for offence under the said Act or said Rules or the previous cancellation or suspension of any licence granted thereunder. Sub-rule (2) of Rule 64 requires the licensing authority to have regard to the average number of licences granted or renewed during the period of three years immediately preceding and the occupation, trade or business ordinarily carried on by such applicant during the said period. The range of circumstances and parameters which the Rules enjoin the licensing authority to consider and have regard to, are indeed and advisedly wide. If one considers the mischief which such enactment intended to suppress, then sufficient though not unfettered discretion ought to be conceded to the licencing authority in matters of determination of competence of an applicant seeking licence to set up a medical store. The entire scheme contained in Rules 64 to 66A is for the purposes of ensuring that licenses for sale or distribution or drugs is granted to a person about whose competence and antecedents there are no reasonable doubt or issues. In matters such as these, the legislature as laid special emphasis upon verification of competence and antecedents, particularly as any laxity in this regard can have disastrous consequences upon a poor, sick and ignorant populace.

12. Rule 65A provides that the application for grant of a licence or any person granted a licence under this Part shall on demand, furnish to the licensing authority, before the grant of the licence or during the period the licence is in force, as the case may be, documentary evidence in respect of the ownership or occupation on rental or other basis of the premises, specified in the application for licence or in the licence granted, constitution of the firm, or any other relevant matter which may be required for the purpose of verifying the correctness of the statements made by the applicant or the licensee which applying for or after obtaining the licence, as the case may be.

The show cause notice dated 14.08.2012 issued to the petitioner, apart from being a measure of procedural fairness adopted by the licensing authority, was in

pursuance of the provisions of Rule 65A of the said Rules.

13. In the case of *Swantraj* (supra), the Supreme Court has indicated the rules of statutory interpretation to be employed in the context of Drugs and Cosmetics Act, 1940 and the rules made thereunder. Where either contentions have some claim to acceptance, what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief whereby the means of licensing meet the ends of ensuring pure and potent remedies for the people. Quoting *Maxwell Magdalen College Case* (1616) 11 Rep 66b, it is observed that the "office of the Judge" is to make such construction as will suppress the mischief and advance the remedy. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*.

This manner of construction has two aspects. One is that the Courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which the parties may have devised in the hope of thereby falling outside the Act. When the Courts find an attempt at concealment, they will, in the words of *Wilmot, C.J.* "brush away the cobweb varnish, and shew the transactions in their true light."

14. In evaluating the challenges raised in this petition, therefore, regard shall have to be had to the materials on record, the provisions of the said Act and said Rules, the purpose of enactment, and finally the rules of statutory interpretation as enunciated by the Supreme Court in the case of *Swantraj* (supra). Considering that the petitioner seeks interference with concurrent findings of facts and exercise of discretion, principles of judicial review shall also have to be adverted to.

15. Applying the aforesaid principles, in my judgment, I find no grounds to interfere with the impugned orders.

16. The findings/conclusions in the impugned orders are substantially borne from the material on record. There is no doubt that the applicant has applied for licence in respect of premises wherein Ravindra earlier operated "*Dattakrupa Medical & General Stores*". The licence for this establishment was cancelled as Ravindra was found to have indulged in unauthorised large scale sale of drugs. Even before the cancellation could be effective, Ravindra made an attempt to obtain licence in name of *Sushma Lahote*, which attempt was not successful. *Sushma Lahote* had also relied upon a leave and licence from Ravindra. The petitioner, despite opportunity has failed to establish his independent credentials. The respondents have held that the petitioner has failed to establish that Ravindra was the owner of the said premises or that he had any authority to execute a leave and licence agreement in respect of said premises. They have

referred to material on record which suggests that the said premises are registered in the name of one Shakuntala A. Jagdale. They have referred to Ravindra executing the leave and licence agreement in his capacity as proprietor of "Dattakrupa Medical & General Stores", in respect of which the licence was cancelled by order dated 02.01.2012. In these circumstances, the findings/conclusions recorded by the respondents with regard to the competence of the petitioner or the possibility of large scale unauthorised sale of drugs from the said premises recurring, cannot be faulted. The findings/conclusions certainly cannot be categorised as perverse as to warrant any interference in exercise of powers of judicial review.

17. Mr. Hegde, appearing for the petitioner has produced a compilation of documents at the stage of hearing assuring me that such documents, except perhaps one certificate, forms the part of records before the licencing and appellate authorities. The documents far from assist the case of the petitioner. There is a ration card which indicates the income of the petitioner as being Rs. 14,400/- per annum. Even if some allowance is made for the circumstance, that this may have been income at the stage of issuance of ration Card, the petitioner has produced no material whatsoever to indicate his financial capacity, from which the licencing authority would have assessed the petitioner's claims to independent credentials. The licence fees indicated in the leave and licence agreement are Rs. 10,000/- per month for a term of five years. Curiously, there is no enhancement clause. There is commitment to pay the Pharmacist Rahul Khare Rs. 10,000/- per month. Investment would be necessary to set up the medical store. The petitioner despite being put on notice that his independent credentials were in issue and that there were reasons to believe that the petitioner was a proxy/front for Ravindra, has failed to produce any material on record. On the contrary, the material available on record was adequate to support the findings/conclusions recorded in impugned orders.

18. Mr. Hegde produced, across the bar, a hand written certificate issued by Asshifa Chemists and Druggists. This certifies that the petitioner was working from January 2004 to October 2010 in the medical shop and that "he was well trends person and handled my medical shop honestly". Such certificate hardly inspires any confidence and in any case does not establish the competence of the petitioner to independently assume charge of the said premises and to supervise and control the sale, distribution and preservation of the drugs.

19. It is well settled that the power of judicial review is neither unqualified, nor unlimited. The court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive as to matters within the province of either and that the court does not supplant "the feel of expert" by its own review. In all such cases, judicial examination is confined to finding of whether the findings of fact have a reasonable basis and whether the said findings are consistent with the laws of the land Heinz India Pvt. Ltd. and Another Vs. State of U.P. and Others, .

20. The powers of judicial review vested in a Court are to be exercised with great circumspection. The court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of

the executive and judicial circumspection keeps the court lock jawed save where the power has been polluted by oblique ends or is otherwise void on well-established grounds. The constitutional balance cannot be upset. State of Punjab and Another Vs. Gurdial Singh and Others,

21. In the case of Council of Civil Service Unions v. Minister for the Civil Service 1985 AC 374, Lord Diplock summed up the permissible grounds of judicial review as being "illegality, "irrationality" and "procedural impropriety". "Illegality" would relate to the decision maker understanding correctly the law that regulates his decision making power and must give effect to it. "Irregularity" would mean that the decision is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied to his mind to the question could have arrived at it. "Irrationality" would also mean "Wednesbury Associated Provincial Picture Houses Ltd. Wednesbury Corpn. (1948) 1 KB 223 unreasonableness" which in turn means a decision passed on irrelevant considerations or upon failure to take into account relevant considerations. "Procedural impropriety" refers to failure to observe Rules of natural justice and fair play.

22. Applying the aforesaid principles to the facts and circumstances of this case, it is clear that there is no illegality,

irrationality or procedural impropriety. In the circumstances, the first two challenges urged by Mr. Hegde, fail.

23. In so far as the third challenge which concerns the order made by the appellate authority (respondent No. 1) in case of M/s. Sana Chemists is concerned, at the outset it needs to be stated that the entire range of facts, which prompted the appellate authority to issue licence, are not before this court. Accordingly, it is not possible to hazard any guess as to what prompted the appellate authority to make such an order. Secondly, there are no general observations in the order made by the appellate authority to the effect that licence can never be refused to applicant who takes premises on leave and licence basis from a person who has suffered cancellation of licence under Drugs and Cosmetics Act and Rules made thereunder. Even if such a broad proposition were to have been laid down by the appellate authority, certainly the same would in no manner influence this court in exercising its writ jurisdiction under Article 226 and 227 of the Constitution of India. This is not a case where the petitioner had urged any malafides against the respondents. In a given case, issue of contradictory and inconsistent orders may be indicative of arbitrariness, non-application of mind or even malafides. However, this is certainly not one of those cases. In the circumstances, I am unable to accede to the submission of the

learned counsel for the petitioner that the impugned orders be interfered with based upon some contrary view taken by the appellate authority in a case, which according to learned counsel for the petitioner is identical to the case of the petitioner. In conclusion, there is no case made out to interfere with the impugned orders. The petition is, accordingly dismissed. Rule is discharged. There shall be no order as to costs.