

(1989) 02 PAT CK 0037

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5943 of 1985

Naya Dawakhana

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-02-1989

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (1990) 2 PLJR 616

Hon'ble Judges : S.B. Sinha, J;P.S. Mishra, J

Bench : Division Bench

Advocate : G.C. Bharuka, N.P. Singh, M/s Basudeo Prasad and Anil Kumar, for the Appellant; J.N.P. Sinha, Alakh Niranjana, Awadhesh Kumar Mishra, M/s Basudeo Prasad and Anil Kumar in C.W.J.C. No. 4788/86, M/s G.C. Bharuka and N.P. Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Both these writ applications with consent of the parties were heard together and are being disposed of by this common judgment. Shorn of all unnecessary details the facts of the matter are as follows:--

The petitioner of C.W.J.C. No. 4788 of 1988 (hereinafter referred to as M/s Medimpex) admittedly had a drug licence duly issued to it in terms of the provisions of the Drugs and Cosmetics Act, 1940 and Drugs and Cosmetic Rules (hereinafter referred to as "Act" and the "Rules" respectively for the sake of brevity). Initially the said licence was granted to M/s Medimpex on or about 8.10.1969 for nine items of drugs. The factory of the petitioner was then situated at Daldali Road. The said licence was allegedly granted on the condition that the said factory must be shifted from the said Daldali Road to some other area which is free from pollution.

2. Thereafter a new licence was granted to the petitioner on 14.9.1971 for a premises which is situated at Saidpur which was to remain valid upto 31.12.1972. The aforementioned new licence was also granted for a total number

of nine drugs.

3. It may be mentioned here that in terms of the provisions of the said Act and the Rules framed thereunder, a licence is required to be obtained for every set of such premises if drugs are manufactured on more than one set of premises. In terms of Rule 72 of the Rules an original or a renewed licence in Form 25A (Form 25-B or Form 25-F) unless sooner suspended or cancelled remains valid up to the 31st December of the year following the year in which it is granted or renewed.

4. In terms of proviso appended to the aforementioned Rules 72, an application for renewal of a licence is to be made before its expiry or within a period of six months of its expiry on payment of additional fees, prescribed therefor. In terms of the said provisions a licence continues to be in force until orders are passed on such an application for renewal and in case no application for renewal is filed within six months within its expiry, the licence would be deemed to have expired.

5. On the expiry of the aforementioned licence which was bearing licence No. 155, M/s Medimpex filed an application for renewal thereof and the said licence was renewed from 1.1.1973 to 31.12.1974 for nine drugs only (vide Annexure-15). Allegedly on or about 21.5.1975 six additional non-biological drugs including "Santonin" was added. From Annexure-:17 to C.W.J.C No. 5943 of 1985, it appears that M/s Medimpex filed an application for the renewal of the aforementioned licence for the period of 1.1.75 to 31.12.1976.

6. The petitioner of C.W.J.C. 5943 of 1985 (hereinafter referred to M/s Naya Dawakhana) has alleged that along with the renewal application, the licensee did not file any application for inclusion of any additional item for inclusion thereof in the said licence in terms of Rule (sic)695) of the rules or at all. The aforementioned statements made in the writ petition of C.W.J.C. No. 5943 of 1985 have not been controverted in the counter-affidavit filed by the respondents including the respondent No. 4 thereof who is petitioner of C.W.J.C. No. 4788 of 1986.

7. Although there does not appear to be any statutory order or circular issued in this regard, it appears from the records of the case which were produced before us by the learned Government Advocate appearing on behalf of the State and its officers that such an application for grant of licence or renewal thereof is processed by a high powered committee. The aforementioned application for renewal of the drug license was placed before the committee on 20.1.1975. It appears that thereafter the Drug Controller by a letter dated 26.2.1976 returned only the list of the drugs (and not the renewal application itself) to M/s Medimpex as allegedly it did not supply the packing conditions in respect of the said drugs. The said letters are contained in Annexure-K and K/1 of the counter-affidavit of the respondent No. 4 filed in C.W.J.C. No. 5943 of 1985.

8. Thereafter, M/s Medimpex supplied the list containing 23 items of drugs which included "Santopar". According to M/s Medimpex, the request to include "Santopar" was made as in 1974 and was pending consideration. Admittedly no

order was passed on the said application. Further the very fact that M/s Mtdimpex also in its application for renewal for the year 19/5-76 did not ask for renewal of licence in respect of "Santopar" clearly goes to show that the said purported application was not acted upon by the authorities nor M/s Medimpex itself pursued the matter any further.

9. However, on or about 11.6.1982 M/s Naya Dawakhana applied for and was granted licence for the drug ""Santopar". The said drug admittedly is a "Santonin and Calomel product the composition whereof is as follows:--

Santonin

I.P. 25 mg.

Calomal

I.P. 10 mg.

Phenaptholine

I.P. 100 mg.

Thereafter M/s Medimpex Ltd. filed a writ application before this Court challenging the grant of the said licence to M/s Naya Dawakhana being C.W.J.C. No. 2747 of 1983.

10. The said writ petition was placed before a Division Bench of this Court. Before this Court various charges of forgery, interpolation etc. were made by the parties thereto. In the aforementioned writ petition, however, it was not disputed that M/s Medimpex had been manufacturing the drug "Santopar" but the question arose for consideration therein was whether M/s Medimpex was doing so under any valid licence or not?

11. In the said writ petition contentions were raised that one party or other thereto had forged and/or fabricated certain documents and charges in respect of interpolation of records maintained in the office of the Drug Market, were also made therein.

12. By a judgment dated 2.8.84 this Court while disposing of the said writ petition directed the Drug Controller to consider as to whether M/s Medimpex Ltd. was manufacturing the drug "Santopar" under a valid licence or not 7 The said order was passed as in the said writ petition serious and disputed questions of fact were to be resolved upon, which was not possible to be done in a writ petition.

The operative portion of the said judgment dated 2.8.1984 as contained in Annexure-2 passed in C.W.J.C. No. 2747 of 1983 reads as follows:--

17. All these facts do require as indicated above, a thorough probe, and if during probe it is found by the authorities that the petitioner was, in fact, manufacturing "Santopar" then the omission of that drug in the petitioner's licence and the

grant of licence to manufacture the same in the same brand name in the licence of respondent No. 4 will be illegal.

It would be well advised if the authorities concerned held an enquiry into the matter to find out the respective claims of the parties. In the result, the petition is disposed with a direction that the respondent No. 1 the Drugs Controller shall hold an enquiry and in so doing shall afford reasonable opportunities to the parties to adduce evidence in support of their respective claims and after hearing them, the Drugs Controller, Govt. of Bihar, Patna shall pass final orders in the matter. It will, however, be open to the petitioner to approach this Court again in case the findings of the enquiry goes against him on untenable grounds.

(Underlining is mine)

13. Thereafter M/s Naya Dawakhana filed an application for review/modification of the aforementioned writ petition as some typographical error was apprehended to have crept in the aforementioned paragraph 1.7 of the judgment and this Court by an order dated 30.1.1985 disposed of the said application which is contained in Annexure-3 to the C.W.J.C. No. 5943 of 1985.

14. The Drug Controller thereafter upon hearing the parties, by an order dated 22.12.1984, inter alia, held that no licence was granted to M/s Medimpex for manufacturing the drug "Santopar". The said order is contained in Annexure-4.

This order of the Drug Controller was admittedly communicated to M/s Medimpex on 27.12.1984. M/s Medimpex thereafter filed a writ petition before this Court which was marked as C.W.J.G. No. 169 of 1985, inter alia, challenging therein that the aforementioned order dated 22.12.1984 was illegal. By an order dated 25.12.1985 as contained in Annexure-5 to the writ petition the said writ petition was permitted to be withdrawn.

15. It may be mentioned herein that although in terms of its earlier judgment dated 2.8.1984 passed in C.W.J.C. 2747/83, this Court gave liberty to any of the aggrieved parties to move this Court against the order of the Drug Controller but in terms of its order dated 25.2.1985 passed in the said writ application and permitted the petitioner thereof to withdraw the said petition with liberty to take recourse to any other remedy which may be available to it in law.

16. On or about 30th April, 1985 M/s Medimpex allegedly filed a memorandum of appeal before the Minister of Health purported to be being aggrieved by and dissatisfied with the order of the Drug Controller dated 22nd December, 1984.

17. In the said appeal M/s Medimpex prayed for a direction for cancelling the licence granted to M/s Naya Dawakhana in respect of the drug "Santopar" and prayed for a further direction to the effect that the said drug should be included in its licence M/s Naya Dawakhana upon having been noticed by the Minister-in-charge challenged his jurisdiction to entertain the same by filing a writ petition in this Court which was marked as C.W.J.C. No. 4191 of 1985 and by an order 17.9.1985 and as contained in Annexure-9, this Court directed the petitioner

thereof to press all its objections in appeal before Hon"ble Minister who was thence in sesin of the matter.

18. By an order dated 15.10.1985 (Annexure 10) the Minister incharge allowed the aforementioned appeal of M/s Medimpex by cancelling licence of M/s Naya Dawakhana and thereby further directed the Drug Controller to renew the licence of M/s Medimpex in respect of the aforementioned drug "Santopar".

19. Pursuant to and in furtherance of the aforementioned directions of the Minister Incharge, the Drug Controller passed an order dated 11.11.1985 which is contained in Annexure-12 to the aforementioned writ petition, whereby and whereunder, M/s Naya Dawakhana was informed that its licence to Manufacture "Santopar" stands cancelled and was further directed to stop manufacturing the said drug.

20. M/s Naya Dawakhana has filed the aforementioned writ application being C.W.J.C. 5943 of 1985, Inter alia, for issuance of an appropriate writ quashing the aforementioned order dated 15.10.1985 and the order dated 11.11.1985 passed by the respondents No. 2 and 3 respectively and as contained in Annex-urts 10 and 12 of the said writ petition.

21. In C.W.J.C. No. 4788/86 M/s Medimpex has prayed for following reliefs:--

For quashing the order dated 6.5.1986 and 7.5.86 (Annexures 6 and 7) issued by Respondent No. 1 by which the entire stock of "Santopar" Tablet produced by the petitioner has been seized; and for a writ of mandamus directing the respondent to issue licence, as directed by the Health Minister, in favour of the petitioner and further directing Respondent No. 2 to stop manufacturing and selling of "Santopar Tablet.

The facts in short giving rise to the aforementioned writ application are that after passing of the aforementioned order dated 15.10.1985 passed by the Minister incharge as also the aforementioned order dated 25.2.1985 passed by the Drug Controller which as stated hereinbefore was issued consequent upon the order of the Minister incharge, M/s Medimpex has been continuing manufacturing the drug in question. Thereafter by an order dated 12.2.86 passed in C.W.J.C. 5943 of 1985, this Court permitted M/s Medimpex to continue to manufacture "Santopar". However, the drugs of the petitioner were seized in terms of the seizure list as contained in Annexure-6 in C.W.J.C. No. 4788 of 1986 which gave rise to the filing of the said writ application.

22. Sri G.C. Bharuka, learned counsel appearing en behalf of the petitioner in C.W.J.C. No. 5943 of 1985 i.e. M/s Naya Dawakhana had questioned the legality, validity and propriety of the order dated 15.10.1985 passed by the Minister incharge and as contained in Annexure-19 to the writ application, inter alia, on the following grounds.

(a) that the order of the Drug Controller having not been passed under the provisions of the said Act or the Rules, no appeal was maintainable against the

order dated 2.12.1984 passed by the Drug Controller. Reference in this connection has been made to Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, .

(b) In the alternative, it has been submitted in terms of Rule 84 (A) of the Rules such an appeal could have been filed only within a period of 30 days from the date of receipt of such an order before the State Government and as the same was not done within the aforementioned statutory period, the respondent No. (sic) had no authority or jurisdiction to entertain the said appeal on expiry of the aforementioned period, in view of the fact that the appellate authority had not been conferred upon with any statutory power to condone the delay in terms of section 5 of the Limitation Act, 1963 or otherwise.

Strong reliance in this connection has been placed upon a recent decision of the Supreme Court in Sakuru Vs. Tanaji, .

(c) In any event M/s Medimpex having tried its luck by filing a writ petition in this court being C.W.J.C. No. 4191/85 wherein it challenged the aforementioned order dated 22.12.1984 passed by the Drug Controller and the said writ petition having been withdrawn it is bound by the said judgment and therefore, cannot be permitted to challenge the order of the Drug Controller collaterally in C.W.J.C. No. 5943 of 1985. Strong reliance in this connection has been placed by the learned counsel upon the decisions of this Court, Kishori Singh vs. State of Bihar (1985 Pat 298) Rita Mishra vs. State of Bihar (1987 P.L.J.R. 1990) and Sarjug Transport vs. State Transport Tribunal, Gwalior, (1987 S.C. 88.)

23. Mr. Basudeo Prasad, learned counsel appearing on behalf of the M/s Medimpex, on the other hand, submitted that by reason of the order dated 22.12.1984 passed by the Drug Controller the licence of the M/s Medimpex was cancelled so far as the same related to the drug "Santopar," and in that view of the matter, the appeal was maintainable in terms of Rule 93(2) of the Rules. The learned counsel further submitted that the limitation for such an appeal being three months, the same has been filed within time. Alternatively, it has been contended that Section 5 of the Limitation Act, 1963 shall apply even in an appeal preferred in terms of the provision of the said Rules.

In this connection, the learned counsel has placed strong reliance upon a decision of the Supreme Court in M/s Ram Prasad Gandamai vs. Municipal Corporation Delhi, reported in 1976 SC 105.

24. The learned counsel has further submitted that in any event, the findings of the fact arrived at by the Minister in charge in his order dated 15.10.1985 and as contained in Annexure 10 to the writ application being binding upon the Drug Controller it could rectify its own mistake which is purported to have been done by an order dated 11.11.1985 and as contained in Annexure-12 to the writ application. The learned counsel in this connection has placed strong reliance upon the decision in Central Manbhum Coal Company (P) Ltd. and another vs. Additional Collector, Dhanbad and others (Reported in 1983 Cal 95.)

25. Shree Prasad has further contended that this Court, even if it is found that the Minister incharge had no jurisdiction to pass the order dated 15.10.1985, should refuse to exercise its extra ordinary jurisdiction to quash the order dated 15.10.1985 and 11.10.1985 passed by the respondent Nos. 2 and 3, as the order dated 20.12.84 passed by the Drug Controller is mala-fide and against the records and which stands set aside by the order of the Minister incharge.

In this connection reference has been made to decisions in A. Mazid vs. State Transport Authority, reported in 1960 Pat 333 : 1960 BLJR 282, M/s Punjab Sikh Regular Motor Service, Bilaspur vs. Union of India others, reported in 1988 MP 43, Gadde Venkateshwara Rao vs. Govt. of Andhra Pradesh, reported in 1966 SC 828, Jaggan Singh vs. State Transport Appellate Authority, Rajasthan, reported in 1980 Rajas-than 1 and Mohammad Swalleh and others vs. 3rd Additional District Judge, Meerut and another, reported in 1988 Vol. I.S.C.C., 40,

26. Mr. Prasad has further taken us through various documents for the purpose of showing that the M/s Medimpex in fact had applied for inclusion of the item "Santopar" in the licence, and as such the order of the Drug Controller according to the learned counsel suffers from a jurisdictional infirmity.

27. Mr. J.N. P. Sinha, the learned Government Advocate appearing on behalf of the State and its officers supported the order dated 15.10.1985 passed by the Minister Incharge. According to the learned Government Advocate, although the appeal against the order dated 22.12.1984 passed by the Drug Controller was not maintainable in terms of the provisions of the Rules, in spite thereof the order passed by the respondent No. 2 is sustainable as he had, thereby, exercised his supervisory power.

The learned Government Advocate has further submitted that in terms of Rule 69 (5) of the Rules, M/s Medimpex could file an application for inclusion of the additional drugs which having been allowed factually, the order dated 15.10.1985 passed by the Minister Incharge cannot be assailed by M/s Naya Dawakhana.

28. From the admitted facts as mentioned hereinbefore, it is absolutely clear that this Court while remitting the matter back to the Drug Controller did so as it was itself not in a position to enquire into the serious and disputed questions of fact. The said order was necessitated by reasons of fact, that the question as to whether M/s Medimpex Ltd. had been manufacturing "Santopar" without any proper and valid licence or not could properly be enquired into and adjudicated by the Drug Controller. The Drug Controller, therefore, while considering such a matter, pursuant to the direction of this Court, was evidently not exercising his statutory power.

29. Mr. Basudeo Prasad, the learned counsel appearing on behalf of the M/s Medimpex, however, submitted that the order of the Drug Controller dated 22nd December, 1984 is in effect and substance an order of cancellation of the licence of M/s Medimpex in so far as the same related to the drug "Santopar" and in that view of the matter the order dated 22nd December, 1984 passed by the Drug

Controller would be deemed to be an order made in terms of Rule 93 of the said Rules. Rule 93 of the said Rules reads as follows:--

Cancellation of licences.--(1) Tie licensing authority may after giving the licensee an opportunity to show cause why such an order should not be passed, by an order in writing stating the reasons therefor, cancel a licence issued under this Part, either wholly or in respect of some of the substances to which it relates, if, in his opinion, the licensee has failed to comply with any of the conditions of the licence or with any of provision of the Act or Rules thereunder.

(2) A licensee whose licence has been suspended or cancelled may appeal to the State Government within three months of the date of the order.

30. Mr. Bharuka, the learned counsel for the petitioner, on the other hand, as noticed hereinbefore, submitted that no appeal was maintainable against the order dated 22nd December, 1984 either in terms of Rule 84 A of the said Rules or in terms of Rule 93 thereof. Rule 84 A of the said Rules reads as follows:--

Provision for appeal to the State Government by party whose licence has not been granted or renewed.--Any person who is aggrieved by the order passed by the licensing authority refusing to grant or renew a licence in (Forms 25, 25-A, 25-B, 25-F, 26, 26-A, 26-B, 26-F, 28, 28-A and 28-B) may within thirty 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 said person an opportunity for representing his views in the matter, make such order in relation thereto as it thinks fit.

31. The learned Government Advocate, however, submitted that the Minister-Incharge while passing the order dated 15.10.1985 (Annexure-10) was really exercising his supervisory jurisdiction.

32. The question