(2004) 08 CAL CK 0060

In the Calcutta High Court

Case No : Writ Petition No. 4993 (W) of 2003

Sanjib Bhattacharya APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Constitution of India, 1950 — Article 19

Drugs and Cosmetics Act, 1940 — Section 21, 22, 22(1), 23(5), 23(6)

Citation : (2005) 4 CHN 404

Hon'ble Judges : Soumitra Sen, J

Bench : Single Bench

Advocate : Srijan Nayak, Rituparna Moitra and Sujit Kumar Koley, for the Appellant;G.P. Banerjee and P.P. Das for respondent No. 7 and Sukia Kabir Sinha, for the Respondent

Judgement

Soumitra Sen, J.—The petitioner is a Registered Pharmacist. Such, registration was obtained on October 30,1977 from the West Bengal Pharmacists Council.

2. The petitioner runs a medical store to sell or distribute retail drugs other than those specified in Schedule ''C'' and ''C-I'' of the Drug Rules, 1945. The petitioner in this writ-petition has alleged high handed action on the part of the respondent authorities in particular respondent No. 7 being one Mr. Subhas Chandra Bera, Senior Inspector of Drugs under the Directorate of Drugs Control, District Drug Control Office, Nadia. It is the petitioner''s case that he has been carrying on with his business without any problems right from inception. Another rival shop after having opened in the locality lodged a complaint against him in May, 2002 before the concerned Police Station. It is contended on behalf of the petitioner that the said Drug Inspector has been visiting his shop room from time to time and has been demanding money. The Association of Bengal Pharmacists and Druggists have also intimated the concerned authorities about the said fact.

3. On July 16, 2002, the said Drug Inspector issued a Form 35 asking the petitioner to produce certificate, challans, purchase orders, cash mernos and

prescribed registration etc. on various dates in support of buying and selling of medicines. It is submitted on behalf of the petitioner that in spite of production of all documents as mentioned in the said Form 35 the said Inspector threatened the petitioner and went on demanding money. Again on July 19, 2002, another Form 35 was issued for production of documents, which were already produced in terms of the earlier Form 35.

4. It is submitted on behalf of the petitioner that except some original documents which were lost in transit, though copies of those documents were available, all other documents as sought for in terms of the Form 35 were produced. By letter dated October 23, 2002, the said Inspector after visiting the shop room of the petitioner demanded documents, which were already produced earlier. However, in the said letter wrong date of 19th of August, 2002 was mentioned. At the intervention of the Assistant Director in the office of District Drug Control the said date was scored out and the correct date was put.

5. Thereafter again on November 1, 2002, a letter was issued by the said Drug Inspector calling upon the petitioner for production of documents which according to the petitioner had already been produced, demand for money was again made. By letter dated November 7, 2002, the petitioner requested for some time to give a proper reply stating that his wife was seriously ill and under treatment. The problems that were faced by the members of the Bengal and Druggists Association were intimated by the said Society through their Secretary in the form of a representation made before the District Magistrate.

Representation was also made before the District Drug Control Office wherein specific allegation against the said Drug Inspector were made as also regarding extortion of money by the Drug Inspectors. On December 21, 2002, the said Drug Inspector being the respondent No. 7 accompanied by police personnel came to the shop room of the petitioner, at that time the petitioner was not present but his son of 12 years of age was present in the said shop room, and demanded production of documents from the petitioner''s son. In spite of being intimated that the petitioner was absent the petitioner''s son was confined in the said shop room in presence of the police personnel. In the meantime, the petitioner''s wife arrived at the said shop room when a letter addressed to the petitioner was handed over to the petitioner''s wife demanding production of certain documents. The said fact of the said Drug Controller visiting the petitioner''s shop room and keeping his son in confinement was duly intimated by way of a representation by the said Association, which was addressed to the Director of Drug Control.

6. On December 27, 2002, the said Drug Inspector lodged a complaint before the Officer-in-Charge of the concerned police station against the petitioner.

7. Against the above factual backdrop it is submitted on behalf of the petitioner that the various provisions of the Drugs and Cosmetics Act, 1940 had not been followed in the instant case. It is submitted that there is no complaint against the

petitioner for selling of misgranted, adulterated, spurious drugs or misgranted cosmetics. It is submitted that neither the shop room was sealed nor any samples were collected. The power of the Inspector is defined u/s 22 of the Drugs and Cosmetics Act and Inspector as defined u/s 21 of the Act can inspect, collect samples and at all reasonable time he can search any person or enter any premises if in any way he has reason to believe that offence under this Chapter 4 of the Drugs and Cosmetics Act, 1940 has been committed and can order in writing not to dispose of any stock or such drugs or cosmetics during a specified period not exceeding 20 days and further the Inspector can ask any person to produce records, registers, documents but all such records, if at all seized, shall be returned to the person within a period of 20 days from the date of such seizure.

8. In terms of Section 23(5)(b) and (c) a Drug Inspector can take action for any of the purposes of the said Chapter under the said Act and if an Inspector seizes any stock or drugs he shall take orders from the Judicial Magistrate to take custody of such seized stock or drugs.

9. Section 23(6) reads as follows :

"Wherein Inspector seizes any record, register, document or any other material object under Clause (cc) of Sub-section (1) of Section 22, he shall as soon as may be informed (Judicial (Magistrate) and take his orders as to the custody thereof."

10. It is submitted on behalf of the petitioner that in the instant case the said Inspector and/or the other Inspectors has or have not followed any other procedure laid down under the Act. Times without number the Inspector had issued memos asking the petitioner to produce certain records and/or documents commencing from the month of July, 2002 till December, 2002. It is submitted that in spite of production of all the documents repeated demands were made for production of the self-same documents.

11. It is submitted on behalf of the petitioner that no show-cause was issued upon the petitioner giving him an opportunity to explain if there was any alleged violation of any provision of the said Act.

12. It is submitted that the complaint before the police authorities were lodged without taking recourse to the relevant provision of law. The said complaint was treated as an FIR by the concerned police authorities and a case was started against the petitioner. As the respondents have not taken any action within the period of 20 days from the date of issuance of first Form 35 which was issued on July 16, 2002, all subsequent actions by the concerned authorities are in excess of authority vested in law and/or are in colorable exercise of authority. It is submitted on behalf of the petitioner that the said Drug Inspector was proceeding in an illegal manner would be apparent from the fact that he deliberately issued a letter dated October 23, 2002 by giving a date of 19th of July, 2002 thereby trying to give an impression that the said letter was issued

earlier but eventually the said date was scored out and the correct date was put at the intervention of the concerned authorities. It was also submitted that the confinement of petitioner''s son of 12 years of age at the said shop room and the harassment meted out to his wife was wholly unlawful and/or unauthorized. As on that date the said Inspector could not have visited the petitioner''s shop room accompanied by police personnel. It is submitted that in spite of bringing the police the said shop room neither was sealed nor any stocks seized. It was done only the intention of exerting undue pressure and/or cause harassment on the petitioner and his family. The petitioner, therefore, has, inter alia, prayed for appropriate orders against the respondents from proceeding with him any further in the matter.

13. The respondents have submitted that the first inspection held on July 16, 2002 carried out by the said Inspector was a routine inspection and upon finding certain discrepancies and irregularities the Form 35 was issued asking for production of certain documents. It was submitted on behalf of the respondents that the Assistant Director of Drug Control instructed the said Inspector on July 16, 2002 to make an enquiry with regard to a complaint received from one Biswajit Niogi wherein it was alleged that the petitioner has been charging excess price of certain medicines along with the said complaint. A copy of a Cash Memo No. 854, dated 4th July, 2002 was enclosed with the complaint on the basis of which instructions were given by the concerned Assistant Director. The said Inspector again visited the shop room on 19th of July, 2004 and issued another Form 35 for disclosure of certain specific documents. The respondents have denied that all documents were shown or submitted to the said Inspector by the petitioner.

14. The respondents in their affidavit had stated that the said Inspectors had filed a report dated 2nd August, 2002, wherein it was specifically stated that all the documents which were asked for were not produced and other irregularities were mentioned. It is stated in the said affidavit filed on behalf of the respondents that on the basis of the said report and certain remarks of the Deputy Director of Drug Control a prima facie case regarding violation of the Drugs (Price Control) Order, 1995 was established. Accordingly, on October 16, 2002 the Director of Drug Control passed an order for lodging a complaint against the petitioner on the basis of alleged violation. It has been submitted-on behalf of the respondents that there was enough material to establish that the petitioner has been violating the Drugs (Price Control) Order by charging excess price for the medicines sold by the petitioner than the scheduled control price. It has been submitted that the said Drug Inspector had acted in accordance with law and has complied with all the provisions required under the said Act. It has also been submitted on behalf of the respondents that the provisions of Sections 22 and 23 of the Drugs and Cosmetics Act is not applicable in the instant case as at no point of time the records have been seized and no Form 15 was issued by the petitioner. It has been submitted on behalf of the respondents that the original documents are necessary but the same were deliberately not produced

by the petitioner for which Form 35 had to be repeatedly issued.

15. From the respective pleadings of the parties, it is apparent that the said Drug Inspector had filed a report as early as on August, 2002, coming to a prima facie finding that the petitioner has violated the provisions of the Drugs (Price Control) Order, 1995 which is punishable under the Essential Commodities Act, 1955. If there is already a prima facie finding I do not see any reasons why even thereafter the said Drug Inspector has visited the shop room and issued repeated letters for production of documents. It also appears that the Director of Drug Control passed an order on October 17, 2002 for lodging a complaint against the petitioner, curiously enough even thereafter in the month of October, November and December, the said Inspector visited the shop room and demanded further documents. In the affidavit filed on behalf of the respondents there is a clear admission that the said Inspector had exceeded his jurisdiction by seeking police help on 21st of December, 2002. It has also been mentioned that the said Inspector had been placed under suspension with effect from 19th of February, 2003.

16. A careful perusal of the various provisions of the said Act and also the Form 35 it appears that a registered Pharmacist is required to maintain certain documents in accordance with Form 35. I have serious doubts as to whether an Inspector can issue Form 35 that too in his own hand on a plain sheet of paper without any official seal as has been done in the instant case. The Inspector is certainly empowered to call for documents by giving a list of certain documents. But, in my opinion, an Inspector is not entitled to issue a Form 35 which is a Form giving details of documents to be maintained by the registered Pharmacist. It was submitted before me on behalf of the respondents it is a matter of practice of the Drug Inspector to issue such a Form. In my opinion, this practice has no sanction and/or authority of law.

17. The petitioner has relied upon the decision reported in State of Punjab Vs. Baldev Singh, etc. etc., , in support of the proposition that before carrying out any search it is imperative for the parties to inform the concerned person of his right, in the said decision the Hon''ble Supreme Court was concerned with the provisions of Narcotic Drugs and Psychotropic Substances Act (61 of 1985) wherein a particular procedure has been laid down in Section 50 for carrying out search and seizure whereunder a person is required to carry out a search before Gazetted Officer or Magistrate. The Hon''ble Supreme Court has held that failure to inform the concerned person of his right as emanating from Sub-section (1) of section 50 of the said Narcotic Drugs and Psychotropic Substances Act, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. It is true such procedure of search of the Narcotic Drugs is not contained in the Drugs and Cosmetics Act, 1940 and the rules framed thereunder. But on 21st of December, 2002, the said Inspector went to the petitioner''s shop room with police force, in effect it assumed the character of a search. But the petitioner was not informed about such search nor

was given any opportunity to explain about the alleged violation.

18. Considering the facts and circumstances, I am constrained to hold that the concerned Inspector had exceeded his authority and/or jurisdiction vested in law in carrying out repeated investigations and/or enquiries in the matter. Repeated issuance of Form 35 and/or letters calling for production of documents also appears to me, to be wholly unauthorized and/or illegal. If the petitioner had indeed (ailed to produce documents on the basis of the first investigation that was carried out on 16th of July, 2002, there was absolutely no necessity for the said Inspector to make repeated visits thereafter, and the said Inspector could have proceeded against the petitioner on the basis of documents which were produced before him pursuant to the first enquiry and/or investigation held on 16th of July, 2002. The explanation sought to be given by the respondents that the enquiry and/or investigation held on 16th of July, 2002 was a routine investigation and on 19th of July, 2002 enquiry and/or investigation held on the basis of the specific complaint appears to me an attempt to cover up the high handed attitude of the said Inspector. It is apparent from the Form 35 issued on 16th of July, 2002 that the Cash Memo No. 854, dated 4th of July, 2002 was duly inspected. Therefore, there was no requirement to give instructions to the said Inspector to make an enquiry only three days thereafter with regard to the same Cash Memo. Since the Drug Inspector had already inspected the said Cash Memo on 16th July, 2002, it could very well be pointed out to the Director of Drug Control that there was no requirement to make further enquiry on the basis of the complaint lodged on 5th of July, 2002 regarding the same Cash Memo on any subsequent date. It appears from the affidavit-in-opposition filed on behalf of the respondents that the allegation against the petitioner is that he has charged excess price of medicines. There is no other allegation of selling spurious and/or unauthorized drugs. There does not seem any allegation that the documents and records were not maintained properly except that certain originals were not available for which some explanations have been given by the petitioner.

19. Since a complaint has already been lodged which has been treated as an FIR, I do not wish to interfere in the process of investigation. But, I make it clear that the concerned authorities in particular the concerned Inspector has acted in a most unlawful and in an illegal manner and in future the concerned authorities should ensure that no Drug Inspector is allowed to visit the shop room of the petitioner on repeated occasions for the self-same cause of action. If after an inspection it is found that there are any irregularities and/or discrepancies, the concerned authorities are at liberty to proceed in accordance with law, but they are not permitted to visit the shop room on repeated occasions which would amount to violation of fundamental right of the petitioner to carry on his business in accordance with the provision of Article 19(i)(g) of the Constitution.

20. I also direct the concerned authority, namely, the respondent No. 2, to carry out a proper enquiry as to the alleged Act of impropriety on the part of said Inspector being the respondent No. 7 herein. In carrying out such an enquiry the

respondent No. 1 may form a committee to assist the respondent No. 2. The enquiry as directed herein shall be concluded within a period of six months from the date of the communication of this order and if the allegations against the said Inspector are found to be correct then appropriate action in accordance with law may be taken against the said Inspector by the appropriate authority. I also make it clear, that the case initiated against the petitioner, shall be positively disposed of within six months from date, failing which, it shall be deemed that the respondents have dropped all charges against the petitioner on the basis of which the case was initiated. This direction is given considering the fact, that the petitioner has already been unduly harassed, and keeping the case pending against him for an indefinite period would only increase his harassment.

21. The writ petition is thus disposed of. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, expeditiously.

