

IN THE HIGH COURT OF DELHI AT NEW DELHI

Writ Petition (Civil) No.11847/2009

Date of decision: 15th December, 2009

SOUTH DELHI DISTRTIBUTORS Petitioner
Through Ms. Richa Kapur, Adv.

versus

GOVT.OF NCT OF DELHI AND ANR. Respondents
Through Ms. Zubeda Begum, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

GITA MITTAL, J (Oral)

1. By this writ petition, the petitioner has assailed an order dated 9th September, 2009 issued under the signatures of the Additional Medical Superintendent, terminating its contract of allotment of premises/shop no.D-1, Casualty Area, GTB Complex, Shahdara, Delhi – 110 095 with effect from three months from the date of the issue of the communication and directing the petitioner to hand over possession thereof to the state Branch.

2. Factual Matrix

There is no material dispute so far as the facts giving rise to the petition are concerned and the same to the extent necessary, are briefly noted hereafter.

2.1 The petitioner had participated in an open tender and was successful in award of licence in the year 2002 for running a chemist shop in respect of the premises/shop no.D-1, Casualty Area, GTB Complex, Shahdara, Delhi – 110 095 for a period of three years.

2.2 The licence in favour of the petitioner was renewed for a further period of three years on terms and conditions set out in the licence deed dated 29th March, 2005. On expiry of this licence, a further renewal was granted to the petitioner and a fresh licence deed dated 20th February, 2008 came to be executed between the parties. As per the terms of this licence deed, the petitioner was permitted to continue with the running of the chemist shop in the same premises till expiry of the licence for a period of three years i.e. on 10th March, 2011.

2.3 The material terms of the licence deed relied upon by the parties relevant for the purposes of the present adjudication may be considered in extenso and read as follows:-

“1. That the allotment of the shop shall initially be made for a period of a term of three years commencing from 11-03-2008 and as such this licence deed shall be deemed to be effective from 11-03-2008 to 10-03-2011. It is further agreed that the present license may be renewed further by the licensor subject to satisfactory performance of the licensee and with 10% increase on year to year basis. In case the licensee desires to renew the license for another term, he may give the consent two months prior to the expiry of the license period.

2. That the licensee shall deposit the monthly license fee of Rs.1,24,344=00 (Rupees One Lac Twenty Four Thousand Three Hundred Forty Four only) in advance by 10th day in the beginning of every month by way of bank draft in favour of Medical Superintendent, Guru Teg Bahadur Hospital, Shahdara, Delhi Hereinafter called the Medical Superintendent if not paid in the stipulated period, a penalty of Rs.100=00 per day will be charged so long for a maximum period of 30 days. There after the Medical Superintendent will have absolute

power to forfeit the security deposit and to terminate the licence of the aforesaid shop.

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4. That the Medical Superintendent will have the absolute power to terminate the licence of the shop without assigning any reason whatsoever.

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13. That the rates agreed by the licensee for the articles sold will normally be not higher than the rates of such articles prevailing in the open market.

14. That the licensee shall be bound to sell the items only relating to his nature and style of business i.e. medicines/drugs, surgical items, implants and instruments and accessories, cosmetics and all other allied items for surgery purpose etc.

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25. That if the licensee wants to discontinue the license during the license period, he shall have to give two months prior notice with enough justification acceptable to the Medical Superintendent.

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30. That the licensor shall not grant any other license to any other person for the business of the same nature and style within the premises of Guru Teg Bahadur Hospital, Shahdara, Delhi.

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33. That all disputes and differences arising out or in any way concerning to this deed except those the decisions whereof or otherwise herein before provided here shall be referred to the Sole Arbitration of any person nominated by the Lt. Governor of N.C.T. Delhi or in case his designation is changed or his office is abolished in the sole Arbitration of any person nominated by the officer who for the time being is entrusted whether or not in addition to other function with the function of Lt. Governor of N.C.T. Delhi by whatever designation such officer may be called. There will be no objection to any such appointments that the arbitrator so appoints objections to Lt. Governor that he had to deal with the matter to which this deed relates and that in the course of his duties such as Government servant he had expressed views in all or any of

the matters in dispute or differences. The award of the Arbitrator so appointed shall be final and binding on the parties.”

(Underlined supplied)

2.4 It has been urged at length by Ms. Richa Kapur, learned counsel for the petitioner that perusal of the licence deed would show that licence deed postulated penalty for failure to deposit the amount of licence fee as a consequence for the breach of licence. Clause 21 in this behalf reads as follows:-

“21. That in the event of committing any breach of any terms and conditions of the licence herein on his part to be observed and performed, the Medical Superintendent with and without prejudice to the other rights of the Government shall be entitled to forfeit the security deposit or any part thereof on the expiration or early termination of the terms of this licence deed.”

2.5 The licence deed empowered the Medical Superintendent to forfeit the security deposit or any part thereof on expiration or early termination of the terms and conditions of the licence in the event of breach of any of the terms and conditions of the licence. It has further been pointed out that in terms of Clause 25, in the event that the licensee wants to discontinue the license during the license period, he is required to give two months prior notice with enough justification acceptable to the Medical Superintendent.

2.6. Clause 30 incorporates a prohibition on the respondents to grant any other licence for running the pharmacy business within the premises of the hospital during the currency of the petitioner's licence.

2.7 Learned counsel has contended that the petitioner is providing a yeoman's service at the Guru Teg Bahadur Hospital and that there is no other chemist shop in the premises to facilitate the thousands of patients.

2.8 In view of the above, it is contended that the petitioner was taken by surprise on receipt of the communication dated 9th September, 2009 informing the petitioner that in exercise of power under Clause 4 of the licence deed made on 20th February, 2008, the respondent had terminated the contract of allotment of the shop of the petitioner with effect from three months from the date of issuance of the communication and required the petitioner to hand over the vacant possession to the state Branch.

3. The present writ petition has been filed assailing this decision dated 9th September, 2009. It is not disputed that the period of three months from the date of said letter expired on or about 9th December, 2009 and the petitioner continues to run the business in the said shop in terms of the order passed on 8th December, 2009 in the present writ petition.

4. Petitioner's Contentions

4.1. Based on the reading of the terms and conditions of the licence deed, it has been urged by Ms. Kapur, learned counsel for the petitioner that termination would be permissible only if there is a violation of any of the terms and that breach of the contract was essential before the termination of the licence could be terminated. It is urged that the impugned action was in violation of Article 14 of Constitution being arbitrary and unreasonable.

4.2 The petitioner's contention is that there was no complaint at all with regard to the performance of the petitioner. In this regard, the petitioner has placed reliance on a response dated 7th October, 2009 received by the petitioner in answer to a query raised under the Right to Information Act ('RTI Act' for brevity hereafter). The petitioner had specifically raised

a query as to whether any complaint had been received with regard to the petitioner's shop. The respondent's response was in the negative.

4.3 To support the entitlement to continue to run the business and to operate the licence for its full term, Ms. Kapur, learned counsel for the petitioner has also urged that the same is also in the financial interest of the respondent.

4.4 In this regard, learned counsel for the respondent has placed reliance on the noting dated 13th February, 2008 received from the respondent, again in answer to a query under the RTI Act. In this noting, the respondent had occasion to consider the petitioner's request for extension of the licence when the respondent had noticed as follows:

“P.U.C. placed opposite in the file received from M/s The Pharmacy regarding extension of period for licence of Shop No.1 (Chemist Shop) situated in shopping complex, near Casualty Block in G.T.B. Hospital. The present occupant M/s The Pharmacy has requested for extension of licence of Shop No.1 for another term of three years i.e. 11.3.08 to 10.3.2011 and has offered increase of licence fee of Rs.1,13,982/- per month. The rate of licence fee would be enough and on the higher side in comparison of existing rate of licence fee in the vicinity of G.T.B. Hospital. The extension of term will also save the expenditure of advt. which will also cost Rs.70,000/- to 80,000/- approx. Hence the same will be beneficial to Govt. Revenue.

In this regard, it is also submitted that as per agreement clause no.26 and 32 (placed at Flag `A') worthy Medical Superintendent is competent to take decision in this regard.

Submitted Please.”

4.5 The petitioner contends that Clause 4 confers draconian power on the respondents and that the same is the result of exercise of unilateral and superior bargaining power of the respondent. Arbitrariness and unreasonableness in the action of the respondent in violation of the constitutional provisions and rights of the petitioner is asserted. It is

contended that the impugned order of termination in purported exercise of the power under Clause 4 is not sustainable on these grounds. It is urged that the impugned decision is neither in public interest nor in the financial interest of the respondents or the public at large.

5. Respondents Contentions

5.1 The respondents have contested the present writ petition both on ground of maintainability and on merits. It has been contended that the writ petition is not maintainable on the grounds of availability of an alternate efficacious remedy. It is urged that the licence deed contains Clause 33 which mandates that the petitioner is required to be relegated to appropriate proceedings for arbitration in terms of the licence. The other submission is that the respondents have the absolute power under Clause 4 of the licence deed to terminate the licence and the decision which has been taken in terms thereof, is not open to judicial review. It is also contended that the action of the respondent is in public interest and the challenge thereto not sustainable.

6. Availability of Alternate Remedy

6.1 I have heard learned counsel for the parties. Before dealing with the matter on the challenge on merits, it becomes necessary to deal with the preliminary objection raised by learned counsel for the respondent to the effect that the present petition would be barred on account of availability of an alternative effective and efficacious remedy to the petitioner under the contract.

6.2 In this behalf, the respondents have drawn my attention to an order dated 15th October, 2004 passed in OMP No.28/2003 which was filed by the petitioner. It appears that the petitioner was at that time working out

the terms of the extended licence. It has been pointed out that despite the currency of the petitioner's licence, the respondents were initiating steps for re-allotment of the shop by floating a tender. In this background, a petition was filed by the petitioner under Section 9 of the Arbitration & Conciliation Act. It was agreed in these proceedings that the respondent may initiate action for re-allotment of the shop w.e.f. 11th January, 2005 while the petitioner would be permitted to carry out its business for the terms of its licence.

6.3 It needs no elaboration that exclusion of writ jurisdiction on grounds of availability of an alternative remedy is really a rule of convenience. No absolute prohibition has been laid down nor can it be so urged. In the judgment reported at **(2003) 2 SCC 107 (Para 7)** entitled **Harbanslal Sahnia Vs. Indian Oil Corporation**, the Supreme Court has reiterated these principles and clearly stated that the exclusion is merely rule of discretion and convenience and not one of compulsion. In this case, the court had laid down the principle that in an appropriate case, despite availability of alternative remedy, the High Court may exercise writ jurisdiction in at least three contingencies:-

- “(i) where the writ petition seeks enforcement of any of the fundamental rights;
- (ii) where there is failure of principles of natural justice; or
- (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.”

6.4 The petitioner has assailed the action of the respondent on all the above grounds though no challenge to the vires of the act is laid. It has been urged at some length that the petitioner's licence has been

terminated without any notice at all, despite two extensions in the past and that this business is the bread and butter of the petitioner.

6.5 Learned counsel for the petitioner has been at pains to argue that the termination is based on no relevant reasons and is absolutely arbitrary and unfair.

6.6 The circumstances in which the petitioner filed the OMP No.28/2003 are materially different from those leading to the filing of the present petition. Merely because the petitioner had invoked the remedy under the Arbitration & Conciliation Act, 1996 would not by itself preclude the petitioner from bringing and maintaining the present writ petition.

6.7 It is further to be noted that as per the impugned order dated 9th September, 2009, the order comes into force within three months thereof which period has ended. In this background, relegation of the petitioner at this stage to the remedy by arbitration shall not be efficacious as well.

6.8 In this background, I am not inclined to accept the objection so far as the maintainability of the writ petition on ground of availability of alternative remedy of arbitration is concerned.

7. Challenge to the order of termination

7.1 So far as the decision against the petitioner is concerned, Ms. Richa Kapur, learned counsel for the petitioner has painstakingly drawn my attention to the reasons for the same. It is contended that the decision is arbitrary and unreasonable and that it has no nexus to the purpose sought to be achieved. Learned counsel has submitted that the decision is not in public interest and is predicated solely on an apprehension of the respondent that allotment of space to the Jan Aushadhi outlet would result in violation of Clause 30 of the licence to the petitioner.

7.2 It has been urged that the action of the respondent has to be tested on the touchstone of the Article 14 of the Constitution of India. Reliance is placed on the pronouncement of the Apex Court reported at **(1979) 3 SCC 489 R.D. Shetty Vs. International Airport Authority & 2008 (8) SCALE 284 Jagmohan Singh Vs. State of Punjab** (para 15). Reliance is also placed on **(2004) 2 SCC 130 Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh & Ors. & (2004) 3 SCC 553 ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors.**

7.3 It is an admitted position that no reason has been assigned in the order dated 9th September, 2009 for the termination of the licence. Before me, it is urged that the respondents have exercised power under Clause 4 of the licence deed which confers absolute and exclusive power on the Medical Superintendent to terminate licence without any reasons.

7.4 Learned counsel for the petitioner has submitted that in these circumstances, the order of termination and the action of the respondent has to be tested having regard to the concerns and considerations which arose before the respondent prior to the passing of the impugned order.

7.5 The instant case is concerned with the termination of the contract to run a chemist shop in a government hospital. It is an admitted position that the hospital is one of the largest in Delhi. According to the petitioner, it is an approximately 1200 bedded hospital and caters to almost 6000 patients in the out patient departments (OPDs) in various specialties.

7.6 The respondents have submitted that they are bound to work the schemes and policies of the Government of India so far as the health

issues are concerned.

7.7 The action taken is sought to be justified on ground of public interest inasmuch as the respondent contended that they are working in the scheme of Government of India to make available quality medicine at affordable price as against average branded medicines at market price.

7.8 Ms. Zubeda Begum, learned counsel for the respondent has handed over a copy of the brochure published by the Department of Pharmaceutical of the Ministry of Chemicals & Fertilizers of the Government of India setting out the purpose of the Jan Aushadhi Campaign. It has been observed thereunder that over the years, India has developed a strong capability in producing quality branded and generic medicines in most of the therapeutic categories, evolving from a mere Rs.1500 crores industry in 1980 to a more than 68,000 crores industry in 2008. However, although these medicines are reasonably priced, as compared to the prices of their equivalent medicines in most other countries, yet a large population of poor people in the country, find it difficult to afford the more expensive branded category of medicines. Steps taken towards this include price control of Scheduled Drugs through the National Pharmaceutical Pricing Authority(NPPA); price regulation of Non-Scheduled Drugs; uniform VAT of 4% on medicines & reduction in excise duty from 16% to 4%.

7.9 However, Government was still not satisfied with the above regulatory and financial steps for ensuring greater availability of medicines at affordable prices to all, specially for the poorer masses and therefore, the Government has launched a country wide Jan Aushadhi Campaign.

The notified key objectives of the Jan Aushadhi Campaign are:-

- “(i) Makes quality the hallmark of medicine availability in the country, by ensuring access to quality medicines through the CPSU supplies and through GMP Complaint manufacturers in the private sector.
- (ii) Despite constraints of budget in the Central and State Governments, extend coverage of quality generic medicines in order to reduce and thereby redefine the unit cost of treatment per person. For example branded Diclofenac tablets are available at the average market rate of Rs.36.70 for a pack of 10 tablets. Jan Aushadhi Stores would be sell this at Rs.3.50 which is less than 10% of the market price of the branded category. Thus with the same cost 10 times more persons could be treated with same efficacy and cure.
- (iii) Creates a demand for generic medicines. By All for All by improving access to better health care through low treatment costs and easy availability wherever needed in All therapeutic categories.”

7.10 The respondents have explained that a communication dated 11th of February, 2009 was received by the hospital from the Health & Family Welfare Department of the Government of NCT of Delhi forwarding the proposal of the Government of India in its order dated 2nd November, 2008 and December, 2008 with regard to opening of Generic Drug Stores “Jan Aushadhi” in Delhi. Comments of the Medical Superintendent on this were called for.

7.11 The respondents have placed reliance on further communications dated 20th August, 2009 and 28th August, 2009 addressed by the Central Government to the Secretary of the Government of NCT of Delhi with regard to the working of the Jan Aushadhi campaign. The Government of India had communicated that the outlets would be open in hospital premises which would be managed by the Kendriya Bhandar of the Govt. of India. It was stated that the locations of these outlets have been

finalised by the Government of India not only at the GTB hospital but at other hospitals including the Lok Nayak Jai Prakash Hospital and the Dr. Bhimrao Ambedkar Hospital, Rohini.

7.12 Ms. Begum, learned counsel for the respondent has contended that as per the communication dated 20th August, 2009, the scheme of the Central Government was that it would “provide a one time assistance of Rs.2,00,000/- as furnishing and establishment costs and further Rs.50,000/- as one time start up costs to the NGO for setting up the Jan Aushadhi (`JAS' for brevity). The programme was postulated to be a self-sustaining business model not depending on Government subsidy for assistance and that it would be run in a campaign mode on the principle of “Not for profits but with minimal profit”. Learned counsel has placed the copy of the brochure which has been published by the Government of India in this behalf on record.

7.13 The Government of India addressed a letter dated 28th of August, 2009 to the Chief Secretary of the Government of NCT of Delhi that the Kendriya Bhandar in consultation with the two hospitals including the GTB Hospital, Shahdara had identified places for opening the Jan Aushadhi stores. A request was made to instruct the authorities to allot these shops to the Kendriya Bhandar immediately so that the stores can be inaugurated by the Chief Minister.

7.14 It appears that at the same time when the respondent received the communication dated 11th February, 2009 from the Govt. of NCT of Delhi, the respondent considered the aspects with regard to the petitioner's shop. On 13th February, 2009, the following noting was recorded on the respondent's file:-

“May kindly see the PUC placed opposite on the bill at 1/C to 3/C received from Kendriya Bhandar, wherein it has been requested to give permission to the said institution to open a Pharmacy/Chemist shop on the complex of GTB Hospital. It has also been stressed upon that Kendriya Bhandar will offer genuine and superior quantity of medicine at reasonable prices.

In this context, it is also worth mentioning that at present one Chemist shop i.e. The Pharmacy is running within Hospital complex and contract has been awarded to the said firm till 10/03/2001. As per the term and condition of the contract Agreement, the licensor shall not grant any other license to any other person for the business of the same nature and style within the premises of GTB Hospital.

It is agreed to we may submit the file before Worthy Medical Superintendent for his consideration in the light of the above.”

(Emphasis supplied)

7.15 The matter proceeded for consideration of the proposal for opening of the Jan Aushadhi outlet. On 19th February, 2009, the following noting was recorded by the respondent:-

“The matter is regarding opening of Pharmacy Shop by Kandriya Bhandar and Generic Drug Shop in the name of “Jan Aushidhi”.

In this context, it is submitted that a license deed was made on 20.02.2008 between GTB Hospital and M/s The Pharmacy wherein as per terms and conditions of the deed (No.30), it has been mentioned that the licensor shall not grant any other license to any other person for the business of the same nature within the premises of GTB Hospital.

Since M/s The Pharmacy is a chemist shop, appropriate action may be taken accordingly.”

(Underlining supplied)

7.16 In view of the above, a communication dated 16th March, 2009 sent from the office of the medical superintendent of the respondent hospital to the Delhi Secretariat wherein it was informed that the present contract of the pharmacy was in force till 10th March, 2011. The Medical Superintendent had clearly informed the Govt. of NCT of Delhi that the

hospital shall not be able to provide space to any other person dealing in drugs till the expiry of the above said contract.

7.17 From a perusal of the above, it would appear that the respondents were concerned about the prohibition contained in Clause 30 of the licence deed dated 20th February, 2008 in favour of the petitioner whereby the respondents were precluded from permitting opening of any other chemist shop in the hospital premises. Clearly it was only on account of the intention to open the Jan Aushadhi outlet which would be operated by the Kendriya Bhandar and the consequences of the prohibition contained in Clause 30 of the licence deed that the respondents were persuaded to initiate the impugned action with regard to the petitioner's licence.

7.18 The noting dated 24th August, 2009 thereafter records that the respondents have reserved shop no.8 in the casualty area for the purposes of opening the Jan Aushadhi store.

7.19 The Government of NCT of Delhi was directed by the Government of India by requiring the Chief Secretary of the Govt. of Delhi to instruct the authorities to allot the shop in GTB hospital to the Kendriya Bhandar immediately. As a result, the Secretary (Health) directed that the allotment of the allocated space by 12.00 noon on 4th September, 2009 be confirmed to him. This direction was sent to the Medical Superintendent of the respondent hospital.

7.20 It is an admitted position that the Jan Aushadhi outlet on the GTB Hospital, Shahdara stands inaugurated during the pendency of these proceedings and is running since 13th November, 2009.

7.21 The action of the termination of the licence taken by the

respondent, has to be examined in this background. The respondents were fully conscious of their responsibility and the prohibition contained in Clause 30 of the licence deed executed in favour of the petitioner and the consequences which would result therefrom. In this background, the following noting was recorded on 24th August, 2009:-

“The matter on the file is regarding allotment of medicine shop in the Hospital Premises.

It is submitted that the extension of period w.e.f. 11.3.2005 for license of this shop was allowed with the approval of Finance Department. (8/N) for three years upto 10.3.2008. In the extension granted w.e.f. 11.3.2005, it was clearly mentioned that initial rate of License fee shall be Rs.94,200/- which will increase @ 10% on year to year basis for the next two years.

However, instead of calling fresh tenders on current competitive market rates, w.e.f. 11.3.2011 but with the approval of Worthy M.S. (11/N). This time, the file was not forwarded to Health & Family Welfare Department/Finance Department for concurrence.

Keeping in view the above circumstances, if agreed, the matter may be placed before Worthy M.S. For consideration and for:

(a) taking necessary action as per terms and conditions No.4 of License Deed dated 20.2.2008.

(b) obtaining expost-facto approval of Finance Department for regularizing the period w.e.f. 11.3.2008 with full justification.”

7.22 The file was put up to the medical superintendent on the same date who approved the proposed action at serial no.`a' above for proceeding as per clause No.4 of the licence deed dated 20th February, 2008 on this very date.

7.23 Pursuant to this direction of the medical superintendent on the 31st August, 2009, the respondents issued the impugned order dated 9th September, 2009 of termination of the petitioner's licence in purported exercise of powers under Clause 4.

7.24 From the above narration, it is apparent that the reason for proceeding against the petitioner is the apprehensions of the respondents if they proceeded to permit opening of a Jan Aushadhi outlet during the currency of the petitioner's licence and nothing else.

7.25 A submission is made that the termination clause 4 of the licence is unfair or unreasonable. In ***AIR1986SC1571 Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly & Anr.***, the Supreme Court reiterated the well settled principle that the courts will enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between the parties who are not equal in bargaining power.

7.26 In the instant case, the petitioner accepted this clause not today but in 2000 when it accepted the award of the licence to it and each time when it renewed and laid no challenge to it till the termination.

7.27 For this reason, I am not inclined to examine the clause from this angle.

7.28 It is also urged that petitioner had a reasonable expectation that he would be working the full period of the contract. The petitioner has urged that this business was its bread and butter and infrastructure for the same stood created. The impact of the termination is not only on the petitioner but on economic and social lives of employees as well.

7.29 From the above discussion, it is apparent that the only reason which weighed with the respondent in passing the order dated 9th September, 2009 was the fact that in view of the prohibition under Clause 30 of the petitioner's licence, its action to allot the space for running the Jan Aushadhi outlet may get clouded. No other reason at all is discernible

from the record which has been placed before me nor any reason is set out in any of the communications or on the record of the present case by the respondents.

7.30 The Jan Aushadhi Scheme of the Government of India has been framed with the aim and objective of providing “quality medicine at affordable prices for all”. The programme targets primarily making medicines available at cheap and affordable rates to the consumers who are the patients visiting hospitals. Inasmuch as the hospitals run by the state are within the control of the Department of Pharmaceutical of the Ministry of Chemical & Fertilizers of the Government of India, it had initially targetted opening of Jan Aushadhi Shops at Government hospitals alone.

7.31 The scheme further envisages provision of generic drugs to the patients other than branded items which are sold only at market prices which may not be affordable to the patients consumers who are of health services in the Government hospitals.

7.32 The termination for a public purpose and justiciable cause cannot be assailed. However, the propounded reason that the decision was taken in bona fide exercise of power under Clause 4 is not borne out from the record of the respondent. It is evident that the respondents were clearly guided by their desire to open Jan Aushadhi outlet and were apprehensive of the consequences of breach of Clause 30 of the petitioner's licence deed.

7.23 It needs no elaboration that even the exercise of a contractual power by the government or its instrumentalities can be subjected to a judicial scrutiny under Article 14 of the Constitution of India on the

touchstone of illegality, irrationality or procedural impropriety, all of which constitute part of unreasonableness in action. The caution on standards of reasonableness to be applied in judicial review are also well settled. A thing is not unreasonable in the legal sense merely because the courts think it is unwise. The limits of the exercise of power were laid down by the supreme court in **AIR 1991 SC 1153 G.B. Mahajan Vs. Jalgaon Municipal Council** relying Administrative Law by H.W.R. Wade, Sixth Edition, in the following terms:-

“The courts are kept out of the lush field of administrative policy, except when policy is inconsistent with the express or implied provisions of a statute which creates the power to which the policy relates or when a decision made in purported exercise of a power is such that a repository of the power, acting reasonably and in good faith, could not have made it. In the latter case, 'something overwhelming' must appear before the Court will intervene. That is, and ought to be, difficult onus for an applicant to discharge. The Courts are not very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds, the Court's view of the range of policies open under the statute or of what is unreasonably policy has not won public acceptance. On the contrary, Curial views of policy have been subjected to stringent criticism. In the world of politics, the Court's opinions on policy are naturally less likely to reflect the popular view than the policies of a democratically elected Government or of expert administrators...”

7.34 The petitioner has contended that it had a reasonable expectation that it would be permitted to fully work out its contract. The doctrine of reasonable or legitimate expectation of a citizen has been held to give a person sufficient locus standi for judicial review of action, but the same by itself may not be a distinct enforceable right. In **AIR 1993 SC 1601 Fertilizer Corporation of India Vs. Kamdhenu Cattle Feed Industries**, the Supreme Court held that failure to consider and give due weight to it may render the decision arbitrary and this is how the

requirement of due consideration of a legitimate expectation forms a part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. However, so far as the manner in which it is to be considered, the court held that :-

“The mere reasonable or legitimate expectation of a citizen, in such a situation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary and this how the requirement due consideration of legitimate expectation forms a part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined no according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.”

7.35 On behalf of the petitioner, it is pointed out that there are several medical specialties and super specialties wherein generic drugs may not be available. Ms. Richa Kapur Kapur, learned counsel for the petitioner has placed the following list before this court:-

Sl. No.	Specialty	Availability in Generic Formulations
1.	Dermatology & Skin	No medicine.
2.	Oncology	No medicine.
3.	Ophthalmology	Only some eye drops.
4.	E.N.T.	Only some tablets. No ointment.
5.	Dental	No paste, mouthwash or gumpaint available.
6.	Cardiac	No life saving infectibles or tablets.
7.	Radiology	No dyes.

8.	Medicine	No insulin inhalers, nebulisers, solutions, liver medications.
9.	Anesthesia	No medicine and injections.
10.	Psychiatry	Full range of mental medicine not available.
11.	Neurology	No medicine or injection.

It is contended that only some antibiotics, iron, B-complex supplement, some gastric medications and some paediatrics preparations in the generic forms are readily available.

7.36 Ms. Richa Kapur, learned counsel for the petitioner has placed reliance on the pronouncement of the Supreme Court reported at ***AIR 1991 SC 537 Kumari Shrilekha Vidyarthi etc. etc. Vs. State of U.P. & Others*** wherein dealing with requirements of Article 14 in the contexts of contractual matters for regulating the conduct of the State activity, the Supreme Court laid down the following proposition of law:-

“28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

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36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of

arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

7.37 Reliance has been placed on the observations of the Apex Court in para 11 of the pronouncement reported at **(1979) 3 SCC 489 R.D. Shetty Vs. International Airport Authority**, wherein the court has observed that the Government when it acts in the matter of granting largesse is not arbitrary and it does not stand in the same position as a private individual. It was observed that the discretion of the Government is not unlimited and the Government cannot give or withhold largesse in its arbitrary discretion. In para 11 of the judgment, the following binding principles which still hold good were laid down:-

11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of business or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation

by private corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised." "The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual.

7.38 Having regard to the contractual nature of the relationship between the parties, reference can be usefully made to the pronouncement of the Apex Court at **AIR 1990 SC 1031 Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors.** In this case, the court was concerned with the refusal of the respondents to supply oil to the petitioner who was its long term dealer and licensee without any reasons or justification. This action of the respondent was assailed before the Apex Court when

the following principles were laid down in para 12 :-

“12. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu and Anr.,(1974)ILLJ172SC; Maneka Gandhi v. Union of India and Anr., [1976]102ITR1(SC); A jay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., (1981)ILLJ103SC; R.D. Shetty v. International Airport Authority of India and Ors. 1979CriLJ905 and also Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay [1989]2SCR751 . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.”

7.39 Ms. Begum, learned counsel for the respondent has distinguished this judgment on facts. However, having regard to the principles which

have been laid hereinabove which bind this court, the distinction on facts will be of no consequence.

7.40 So far as the products which the petitioner was permitted to sell, are concerned, the same are listed in Clause 14 of the licence deed which permits the petitioner/licencee to be bound to sell items only relating to the nature and style of business of pharmacy which has been described to include the medicines/drugs, surgical items, implants, instrument and all other and accessories, cosmetics and all other allied items for surgery purposes etc. The respondents exercise a scrutiny and control with regard to the price at which these are sold in terms of the licence deed.

7.41 It is also not the respondent's case that the Jan Aushadhi outlet is going to be supplying surgical equipments, implants and other items which have been mentioned in clause 14 of the licence deed.

7.42 As stipulated in the licence deed, the petitioner's shop is the only chemist shop in the hospital. There was thus no other chemist shop existing to cater to the huge daily influx of the patients. The respondents do not propose to open any other chemist shop.

7.43 There can be no doubt that the efforts to provide quality medicine at affordable price is not only laudable but is essential and deserves to be encouraged and implemented in the right earnest. However, if the submissions made by learned counsel for the petitioner are correct then efforts to provide only generic drugs at the hospital complex to the exclusion of all other medicines may defeat the very purpose for which the scheme has been formulated. This is not the declared object of the scheme of the Government. The patients seeking treatment at the public hospital would be deprived of a facility of the chemist shop in respect of

the several medications for which generic formulations are not available in the market. Medical treatment is not confined to medication alone. Surgical and orthopedic procedures may require several implants and implements.

7.44 The decision of respondent to terminate the licence of the petitioner results in detriment to the interest of the patients for whose benefit the decision is contended to have been taken. The decision of the respondents in this background, is clearly unreasonable and not in furtherance of any public purpose at all

7.45 The stand taken by the respondent to the effect that their action in termination of the contract under Clause 4 is not justiciable for the reason that they were entitled to proceed in the matter in this manner, cannot be sustained in view of the plethora of judgments noted above.

7.46 Learned counsel for the petitioner has also placed reliance on the pronouncement reported at **(2004) 2 SCC 130 Teri Oat Estates Private Limited Vs. U.T. Chandigarh** in support of the contention that the order of termination was drastic and in the facts of the case, not sustainable.

7.47 I find that in the pronouncement reported at **(2004) 3 SCC 553 ABL International Limited Vs. Export Credit Guarantee Corporation of India Ltd.**, the Apex Court has observed that there was no absolute rule to the effect in all cases involving disputed questions of facts, the parties are required to be relegated to a civil suit.

This issue, however, does not really arise for consideration in the present case.

7.48 On 8th December, 2009, Ms. Richa Kapur, learned counsel for the

petitioner had contended that in case the petitioner is permitted to run its business at the premises in question for the full tenure as per the licence deed dated 20th February, 2008 which would come to an end till 10th March, 2011, the petitioner would not insist on claiming under Clause 30 of the licence deed and would not raise any objection to the respondents permitting any other chemist shop or drug shop in the premises in question. Learned counsel for the petitioner also submitted that the petitioner was willing to place an affidavit in this regard on record.

7.49 Pursuant to the above statement, the petitioner has filed an affidavit dated 11th December, 2009 wherein in para 2, a specific undertaking has been given to the following effect:-

“2. That the deponent undertakes that if M/s South Delhi Distributor is permitted to run its business from Shop No.1 within the premises of Guru Teg Bahadur Hospital Delhi for the full tenure as per the licence deed dated 20th February, 2008 which would come to an end till 10th March, 2011, the deponent would not insist on claiming under clause 30 of the licence deed and would not raise any objection to the Licensor Respondent No.2 permitting to run the Shop No.8 in question by Kendrya Bhandar as `Jan Aushadhi'.”

7.50 This undertaking on behalf of the petitioner is accepted and the petitioner shall remain bound by the terms thereof. In this view of the matter, the apprehensions of the respondent based on the prohibition in Clause 30 also do not survive. Thus the apprehensions of the respondent that there would be a breach of the terms of the licence deed dated 20th February, 2009 if it permitted setting up of a Jan Aushadhi outlet are also completely removed.

7.51 The petitioner was granted renewal of the licence and had a reasonable expectation that he would be permitted to work the full terms

thereof. It has been urged that the closure of their business would amount to taking away the bread and butter and only source of livelihood of the petitioner.

8. In view of the above discussion, the very substratum for the impugned decision has gone. It has to be held that the action of the respondent to terminate the licence of the petitioner on 31st August, 2009 and the communication thereof by the letter dated 9th September, 2009 is arbitrary, unreasonable and not sustainable.

Result

9. It is, accordingly, directed that the order dated 31st August, 2009 communicated by the letter dated 9th September, 2009 shall stand hereby set aside and quashed.

This writ petition is allowed in the above terms.

DECEMBER 15, 2009
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GITA MITTAL,J