

\$~40

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) NO.10280/2015 & CM No.25532/2015 (for stay)

HARI OM GUPTA

..... Petitioner

Through: Mr. Gurmit Singh Hans with Mr.
Vihsal Soni, Mr. Kunal Bhardwaj and
Ms. Aarti Manchanda, Advs.

Versus

GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms. Jyoti Taneja, Adv. for GNCTD
with Mr. K.C. Aggarwal, Assistant
Drug Controller and Mr. B. Sahu,
Drugs Inspector.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

05.11.2015

1. The petition impugns, (i) the order dated 7th September, 2015 of the Assistant Drugs Controller of the respondent Govt. of NCT of Delhi (GNCTD) acting as the Licensing Authority under the Drugs and Cosmetics Act, 1940 of cancellation / revocation of the licence of the petitioner valid till 1st April, 2019 to run and operate a chemist shop; and, (ii) the order dated 21st October, 2015 of the Lt. Governor, Delhi exercising powers as an Appellate Authority, of dismissal of the appeal preferred by the petitioner against the order of cancelation of his licence.

2. The petition had come up before this Court first on 2nd November,

2015, when the counsel for the respondent GNCTD appearing on advance notice was asked to obtain instructions and to ensure presence of the concerned official along with records in the Court today. In compliance therewith Mr. K.C. Aggarwal, Assistant Drug Controller and Mr. B. Sahu, Drugs Inspector are present in Court. The counsels have been heard.

3. The premises of the petitioner at Shops No.3&4, 15A Mahindra Park, Sanjay Nagar, Delhi were inspected by the Drugs Inspectors of the respondent GNCTD on 13th May, 2015 in the presence of Mr. Shriniwas Gupta person in charge. It was *inter alia* found, (i) that the original licences were not displayed; (ii) that the records for Schedule H-1 drugs were not found maintained; (iii) that the records of purchase and sale of ten drugs found stocked for sale/distribution in the premises were not produced; (iv) another drug found to have been purchased but no sale invoices / records of sale were found; and, (v) Form 35 was not found maintained. A memorandum dated 15th May, 2015 was issued to the petitioner of the discrepancies aforesaid found during the said inspection. The petitioner was asked to show cause as to why his licence should not be suspended / cancelled under Rule 66 of the Drugs and Cosmetics Rules, 1945 for the contraventions aforesaid of Rules 65(3), (4) & (16) of the said Rules.

4. The petitioner submitted a reply and also availed of an opportunity of hearing.

5. The Assistant Drugs Controller vide impugned order aforesaid cancelled the licences of the petitioner with immediate effect and gave time of 30 days to the petitioner to dispose of his current stocks in accordance with the provisions of Rule 66A of the Rules. It is recorded in the said order that the petitioner in reply to the show cause notice and in the hearing had admitted to the discrepancies aforesaid and had assured not to repeat the same in future but which was not found satisfactory. It is further recorded in the said order that the petitioner had on earlier occasion also been warned vide memorandum dated 3rd November, 2008 and the licence of the petitioner had also been suspended on an earlier occasion for a period of two days vide order dated 30th January, 2012 for similar offences.

6. The Lt. Governor has dismissed the appeal preferred by the petitioner accepting the arguments of the respondent that the petitioner had been found dealing in 'habit forming drugs' and the respondent had been receiving a large number of complaints in which the main allegation is of the medical stores in Mahendra Park indulging in the sale of 'habit forming drugs' and thereby affecting the public and innocent people are becoming the victim.

The petitioner was reasoned to be part of same, since the petitioner was found not maintaining the requisite records and could not produce the documents at the time of inspection. It was further reasoned that the licence for a medical store is given to make available drugs / medicines to the public in their neighbourhood and not for the purpose which affects their health adversely.

7. The counsel for the petitioner during the hearing on 2nd November, 2015 and today has not controverted that the documents were not produced / shown as the time inspection. His contention was that all the said documents were produced along with reply to the show cause notice and thus the petitioner could not be said to be not maintaining the same as was required. However, it was clarified that register of Schedule H-1 drugs was not being maintained and thus could not be produced but the same is labeled as an inadvertent / innocent mistake on the part of the petitioner.

8. The matter on 2nd November, 2015 was adjourned to enable the counsel for the respondent GNCTD to show that the documents aforesaid are required to be maintained at the premises and to be offered for inspection whenever demanded. The argument of the counsel for the petitioner then was that the documents could not be shown because the petitioner was

personally not present at the time of inspection and his employees could not show the documents demanded. It was as such also enquired from the counsel for the respondent GNCTD, whether it is mandatory for the licensee to be personally present in the shop at all times when it is open for sale.

9. The counsel for the respondent GNCTD today has stated that Mr. Srinivas Gupta who was admittedly present at the time of inspection is the registered Pharmacist and brother of the petitioner and thus it cannot be said that absence of the petitioner at the time of inspection was the cause for non-production of any document. Attention is also invited to Rule 65(3)(i) and 65(6) requiring maintenance of a register with the particulars as specified therein and to be offered for inspection 'whenever demanded'. The counsel for the respondent GNCTD in Court has also handed over photocopies of the complaints of the Residents Welfare Association (RWA) of the Chemists in the said locality selling Schedule H-1 drugs required to be sold by the Chemists only on prescription of registered medical practitioners, without any such prescription, leading to the residents of the locality forming a habit. The counsel on instructions from the officials present also states that in fact the premises of the petitioner were found to be stocking mostly the said drugs, with the proportion of the other drugs being very small; though it is

fairly admitted that the same is not recorded in the inspection report or in the show cause notice or in the order—but the official concerned was the Inspector who had carried out the inspection.

10. From the aforesaid provisions it is clear that the entries in the register to be maintained have to be made at the time of each sale and the records of sale / purchase of drugs are required to be maintained and offered for inspection.

11. In the light thereof, the explanation of the counsel for the petitioner that the documents could not be produced and were produced along with the reply to the show cause notice cannot be a ground for non-compliance with the statutory provisions. Experience of life has shown that upon time being available, it is not difficult at all to prepare registers and / or to procure and manufacture the bills of sale / purchase. The Supreme Court in the context of the inspections under the Indian Medical Council Act, 1956 in ***Manohar Lal Sharma Vs. Medical Council of India*** (2013) 10 SCC 60 has held that the inspection always has to have an element of surprise inasmuch as inspection after notice loses its purpose. The same is the position here. Once the rule requires a Chemist to maintain the records and to make entries therein at the time of each transaction, the non-availability of the said records

at the time of surprise inspection is a clear indication of the said rule having been violated. Once the rule, subject to compliance with which the licence was given to the petitioner, has admittedly been violated, I do not see any ground on which the petitioner can be heard to say that the consequence thereof of cancellation of licence should not follow.

12. The counsel for the petitioner has however drawn attention to the Proviso to Rule 66 which provides for such cancelation. To appreciate the contention, it is deemed appropriate to set out herein below the entire Rule 66 of the Rules:

“66. Cancellation and suspension of licences.—(1) the 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 therefore, cancel a licence issued under this Part or suspend it for such period as he thinks fit, 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 provisions of the Act or rules thereunder:

Provided that, where such failure or contravention is the consequence of an Act or omission on the part of an agent or employee, the licence shall not be cancelled or suspended if the licensee proves to the satisfaction of the licensing authority—

- (a) that the act or omission was not instigated or connived at by him or if the licensee is a firm or company, by a partner of the firm or a director of the company, or***
- (b) that he or his agent or employee had not been***

guilty of any similar act or omission within twelve months before the date on which the act or omission in question took place, or where his agent or employee had been guilty of any such act or omission, the licensee had not or could not reasonably have had, knowledge of that previous act or omission, or

(c) if the act or omission was a continuing act or omission, he had not or could not reasonably have had knowledge of that previous act or omission, or

(d) that he had used due diligence to ensure that the conditions of the licence or the provisions of the Act or the rules thereunder were observed.

(2) A licensee whose licence has been suspended or cancelled may, within three months of the date of order under sub-rule (1), prefer an appeal against that order to the State Government, which shall decide the same."

(emphasis added)

13. The counsel for the petitioner has argued that under the Proviso aforesaid, even though the petitioner was guilty of contravention of the Rules leading to cancellation under Rule 66(1), since the allegation against the petitioner was that he had committed similar violence in the years 2008 and 2012 and not one year prior to the issuance of the show cause notice, the petitioner is entitled to the benefit of Clause (b) of the Proviso.

14. I am unable to agree. The Proviso is applicable only where the contravention is the consequence of act or omission of an agent or employee and not otherwise. In the present case, the petitioner is admittedly in

violation of the requirement to maintain register of sale of Schedule H-1 drugs. The said violation cannot be attributed to any agent or employee of the petitioner. The petitioner himself as the licensee was required to ensure maintenance of the said register. The reason for maintenance of the said register is not difficult to fathom. Since Schedule H-1 drugs mentioned in the show cause notice are habit forming, the provision for maintenance of register is intended to prevent sale thereof, without the same being prescribed. The petitioner admittedly was not maintaining the said register.

15. The argument, that the same was a mistake, also cannot be accepted. The petitioner was carrying on business in articles affecting health and cannot afford to make such mistakes which have the impact on the human life. If the petitioner is susceptible to make such mistakes, it is all the more reason for the petitioner being not entitled to the licence to sell medicines / drugs, which cannot be claimed as a fundamental right.

16. The counsel for the petitioner has in this regard relied on the judgment dated 21st March, 1976 of High Court of Guwahati titled ***Mst. Saleha Khatun Bewa Vs. The State of Assam*** but in view of the Proviso itself having not to be attracted, the question of applicability thereof does not arise.

17. The counsel for the petitioner has lastly contended that the petitioner

holds licence besides for Schedule H-1 drugs, also for Ayurvedic drugs and for the violations with respect to Allopathic drugs, the licence with respect to the Ayurvedic drugs has also been cancelled.

18. Mr. K.C. Aggarwal, Assistant Drug Controller present in Court states that the Licensing Authority under the Drugs Act is not the Licensing Authority for Ayurvedic medicines and the cancellation of the licence on Forms 20 & 21 is with reference to the cancellation of licence for sale of biological and Schedule H-1 drugs.

19. There is no merit in the petition; dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 05, 2015

bs