

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

% Judgment Reserved on: 09th September, 2021
Judgment delivered on: 22nd November, 2021

+ W.P.(C) 2236/2021 & CM. APPLS. 6479-80/2021

HIMANSHU BHATIA & Another Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL AND ORS..... Respondent

Advocates who appeared in this case:

For the Petitioners: Ms. Shobhana Takiar, Advocate.

For the Respondents: Mr. Yoginder Handoo, ASC with Mr. Ashwin Kataria and Mr. Raghav Bhalla, Advocates for NDMC.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. Petitioners impugn order dated 25.09.2020 whereby the application of the petitioners seeking change of trade and deletion of name of petitioner No. 1, from the partnership, has been rejected on the ground that no prior written approval of New Delhi Municipal Council (NDMC for short) was taken before dissolving the partnership and that Petitioners had defaulted in payment of the licence fee.

2. By allotment letter dated 09.04.2015, Petitioner No. 1 was

allotted Shop No. 1, AIIMS Subway, New Delhi on licence basis. On 24.06.2016 Licence Deed was executed for a period of ten years at a monthly licence fee of Rs. 1,53,000/- in addition to sanitation charges and service tax for running the trade of surgical items which is a non-licensable trade.

3. Petitioner no. 1 requested the respondent to accept the Partnership of the Petitioner no. 1 with the Petitioner no. 2 as per their policy, which was accepted by letter dated 25.05.2017 subject to completion of all codal formalities as mentioned therein.

4. It is alleged by the Petitioners that in terms of the Policy of the Respondents dated 16.08.2016, Petitioners applied for change of trade in respect of the said Shop from non-licensable trade to licensable trade of running a chemist shop. Representations are alleged to have been given on 27.03.2018, 11.06.2018, 25.08.2018 and 12.11.2018.

5. It is contended that instead of deciding the application for change of trade, Respondents issued notice dated 05.12.2018 for payment of arrears of licence fee failing which, it was stated that proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, would be initiated.

6. Petitioners again, vide letter dated 11.12.2018, requested for change of trade to licensable trade and also requested for payment of

arrears of licence fee in six equal instalments.

7. Thereafter requests for change of trade were also made by letters dated 19.03.2019, 22.04.2019 and 29.04.2019.

8. Since there was no decision on the representations, Petitioners filed a Writ Petition before this court, being W.P. (C) No. 4907/19, seeking a direction to the respondents to change the trade from surgical to surgical cum chemist as well as change the licence deed in favour of the petitioner no. 2 as per the policy dated 16.08.2016.

9. It is contended by the Petitioners, that the only objection taken by the respondents, in the said proceedings, was that without clearing the dues, petitioners could not insist on grant of change of licence from non licence to licence trade and it was contended that on clearance of the arrears of licence fee, the case of the petitioner for change of trade would be considered by the competent authority in accordance with the Policy.

10. Noticing the above stand of the Respondents, Petition was disposed of by order dated 02.08.2019.

11. It is contended that the Petitioner has already obtained the requisite No Objection Certificate from Health, Water, Sewerage and Electricity Departments.

12. Respondents by the impugned order dated 25.09.2020, rejected the application of the Petitioner for change of trade on the ground that no prior written approval of NDMC was taken before dissolving the partnership and that Petitioners had defaulted in payment of the licence fee.

13. Impugning the order dated 25.09.2020, Petitioners have filed this Petition.

14. Subsequently, during pendency of this petition, another order has been passed by the Respondents on 20.07.2021, once again rejecting the request for change of trade.

15. In the impugned order, it is held that Petitioners had sought to dissolve their partnership by a dissolution of partnership agreement dated 06.06.2019, which was executed without prior permission from the NDMC. Order dated 20.07.2021 further records that affidavit dated 03.03.2021 was filed by the Petitioner, withdrawing the dissolution of partnership. Reference is then made to Section 39 of the Partnership Act to hold that the conditions of the agreement are such that it brought about an irretrievable breakdown of the relationship and the detailed dissolution deed could not be withdrawn by a mere affidavit.

16. Order dated 20.07.2021 records the grounds for rejection as

under:

- (i) *There is no legal sanctity of the affidavit dated 03.03.2021 vide which he has withdrawn the said Dissolution deed.*
- (ii) *Being a habitual defaulter in paying the license fee.*

17. During the pendency of the present proceedings, entire arrears of the licence fee have been cleared.

18. It is further contended by learned counsel for the Petitioner that the request for deletion of name of one of the partner was well within the knowledge of the respondents at the time of disposal of W.P. (C) No. 4907/2019 and the respondents gave an assurance vide the consent order that they were ready and willing to accede to the prayers of the petitioner subject to payment of licence fee.

19. It is submitted that Petitioners in a sacrosanct manner complied with consent order within stipulated period granted by the Hon'ble Court and cleared the entire arrears of the licence fee but respondents failed to honour the assurance given before the Hon'ble Court and rejected the request for change of trade.

20. It is submitted that in similar circumstances change of trade and dissolution of partnership has been accepted by the Respondents in terms of their policy of 16.08.2016.

21. Learned counsel for the Respondent does not dispute that

change of trade from non-licence trade to licence trade is permissible as per the policy of NDMC and even dissolution of partnership is acceptable, however in the case of the Petitioners, it is contended that as there were arrears of licence fee and the partnership was dissolved without prior consent of the NDMC, the application was rejected. It is further contended that once the partnership has dissolved by operation of law i.e. execution of deed of dissolution, the same cannot be withdrawn by a mere affidavit.

22. It would be expedient to refer to the terms of the policy dated 16.08.2016 of the NDMC.

23. Clauses 4 with regard to change of trade stipulates as under:

“4. *Change of Trade*

iv) *Change of trade from (a) ‘non-licence Trade’ to ‘Licence Trade’; or (b) ‘licence trade’ or ‘licence trade’, may be allowed subject to the following conditions:*

a) *No Objection Certificate (NOC) shall be obtained from Health, Water, Sewerage, and Electricity Departments. If a decision on application for such NOC is not taken and uploaded on the website of the NDMC within a period of 30 days from the date of receipt of such application in the NDMC, such application for NOC will be deemed approved, in case of deemed approval of*

such application, Head of the Department will be held responsible for such delay or any eventuality arising out of such deemed approval;

b) Prior permission of NDMC shall be obtained; and Enhancement in the licence fee by 50%.

*****”

24. Clause 4 of the Policy dealing with change of trade, stipulates that change of trade from licence to non licence trade is permissible subject to certain conditions i.e. obtaining NOC from certain departments, prior permission of NDMC and 50% enhancement in licence fee.

25. In the instant case, the only reason for rejection of the application is that there are arrears of licence fee and Petitioners have dissolved the partnership without prior permission of NDMC.

26. Petitioners after the directions issued by this court in the earlier Writ Petition and even now cleared the entire arrears of Licence fee. Petitioners have also obtained the necessary NOC from the various specified departments as per the Policy. In any event, if any NOC is pending, Petitioners would be obliged to obtain the same. With regard to enhancement of licence fee by 50%, Petitioners have categorically stated that they shall pay the same. Petitioners clearly satisfy all

requirements of the Policy for change of trade from non-licence to licence trade. The only objection is with regard to dissolution of partnership without permission of the NDMC.

27. For determining the merits of the said objection, it would be expedient to refer to Clause 6 of the policy that deals with the Transfer of licence on partnership basis:

“6. Transfer of licence on Partnership basis:

- (i) All cases before the date of issuing this circular i.e. 16.8.2016 shall be governed as per the Council's resolutions application as on that date.*
- (ii) For prospective cases of transfer: Prior permission of the NDMC is made mandatory in terms of the modified clause no. 9 of the standard Licence Deed before entering into partnership or to allow any person to use the shop in any manner during the valid term of licence subject to enhancement of the existing licence fee by 50%. In default of such prior permission, the licensee/occupant shall be liable for eviction and ejectment being unauthorized occupant besides forfeiture of the security deposit and damage charges.*
- (iii) For pending cases of transfer: Partnership entered before the date of issuing this circular i.e. 16.8.2016, NDMC will entertain such cases, irrespective of whether the same was done during the valid term of licence or after expiry of the licence, as an exceptional case. If the occupant*

now seeks the permission of the NDMC at this belated stage, such transfer cases shall be regularized after forfeiting the earlier security deposit by the licensee and subject to enhancement of the licence fee by such percentage as per the respective Council's resolutions applicable as on that date for each such transfer and completion of other required formalities like deposit of fresh security deposit, etc.

- (iv) *In cases, wherein the licence holder has died and has nominated any other person or organization for using whole of such premises only for purposes such as literature, science, art and social service, without any commercial usage, in such cases the application for transfer of licence, alongwith an undertaking by the applicant to not use such premises for any commercial purpose, may be considered on case to case basis, subject to enhancement of the licence fee by 50%. In case of date of such transfer is before the date of issuing this circular i.e. 16.8.2016, enhancement of the licence fee will be by such percentage as per the respective Council's resolutions applicable as on that date for each such transfer. If at any time, it is found that such premises is used for commercial usage, then licence of such premises will stand terminated after giving a notice of 21 days to such licence holder by Director (Estate).*
- (v) *Transfers are freely allowed (except in case of premises granted under special considerations such as SC/ST/OBC/Physically challenged etc.) in the above manner only.*
- (vi) *In case of date of entry of partnership on or after*

issuing of this circular i.e. 16.8.2016, there will be 30% enhancement in the licence fee. In case of date of entry of partnership before 16th August, 2016 enhancement of the licence fee will be by such percentage as per the respective Council's resolutions applicable as on that date for each such partnership.

- (vii) If the status of the individual licensee is converted into the Private Limited Companies, the same shall be permissible subject to enhancement in the existing licence fee by 50%. The existing/proposed private limited companies/companies seeking transfer shall have to submit annual declaration indicating change in equity holding pattern, if any. Whenever, there is change in equity holding pattern of more than 25%, the licence fee of such company shall be enhanced by 50% w.e.f. the date of change of such equity holding pattern.*
- (viii) Any issue/point not covered under the above policy shall be decided by the Chairman on merits, while keeping the overall spirit of this policy.*
- (ix) Deletion of name of partner is allowed without any cost with prior approval of NDMC, subject to NOC from all other holders of that licence.*
- (x) Cases involving multiple transfer are to be dealt in accordance with the above proposals.”*

28. Sub-clause (v) of Clause 6 of the Policy shows that the licence is freely transferable except in cases where the premises is granted under special considerations such as SC/ST/OBC/Physically

challenged etc.. The transfer on partnership basis is subject to enhancement of licence fee at the rates stipulated for different categories.

29. Apart from differential in licence fee for different categories and except where premises are allotted under special considerations, transfer of licence is freely permissible.

30. Even in the case of the Petitioners, Petitioner No. 1 was originally allotted the shop by Licence Deed dated 24.06.2016 and thereafter petitioner No. 2 was permitted to be inducted as a partner on 25.05.2017. Petitioner No. 1 wanted to retire and accordingly a dissolution deed has been executed on. The sole reason for rejection of the same is that prior permission of NDMC has not been taken.

31. Deletion of the name of the partner is permissible by sub-clause (x) of the Policy which stipulates that deletion of name of partner is allowed, without any cost, with prior approval of NDMC, subject to NOC from all other holders of that licence.

32. In the instant case there are only two partners i.e. the petitioners. Petitioner No. 1 consents to deletion of his name. As per the Policy, in case of deletion of a name there is no change in the terms and conditions of the licence or licence fee or any formalities required to be completed except obtaining prior permission of the

NDMC. The Policy also does not stipulate any conditions under which deletion of the name is to be permitted except NOC from all other holders of the Licence.

33. The only objection of NDMC is that prior permission was not taken of NDMC before the execution of the deed of dissolution. On the one hand, NDMC contends that prior permission was not taken before dissolving the partnership and as such the same cannot be accepted and on the other hand, it contends that the affidavit withdrawing the deed of dissolution cannot be accepted.

34. Be that as it may, the question that arises for consideration is as to whether the condition of obtaining prior NOC from NDMC for deletion of the name of a partner is mandatory or directory.

35. As noticed above, as per the policy, there are no additional conditions to be fulfilled for deletion of the name of a partner. Condition stipulating prior permission of NDMC for addition of a partner, is understandable and reasonable as addition of a partner amounts to transfer of rights in favour of a third party. However, where the name of a partner is to be deleted, the effect of deletion of a partner would be that the share of such partner is transferred to an existing partner and no third party right is created. In such a situation to hold that the condition of obtaining prior permission from NDMC, prior to deletion of the name of a partner, is mandatory and breach of

the same would be a material breach and would entail penal consequences, would militate against the scheme of the policy which permits free transfer of licence, especially when there are no additional conditions to be satisfied.

36. Accordingly, it is held that the condition of obtaining prior NOC from NDMC for deletion of the name of a partner is directory and not mandatory. The condition would be satisfied, if the NDMC is duly informed of the deletion of the name of the partner.

37. Thus, the dissolution of the partnership by the Petitioners, without prior permission of NDMC, would not amount to a material breach of any condition of the Licence or the Policy, accordingly, the Respondent could not have rejected the application for change of trade merely on the said ground.

38. For the reasons hereinabove, both the orders of the Respondent NDMC dated 25.09.2020 and 20.07.2021 are not sustainable and are quashed.

39. In view of the above, the application of the Petitioners seeking change of trade i.e. from non-licence trade of surgical only to licence trade of surgical cum chemist is allowed subject to petitioners obtaining the requisite NOCs, if not already obtained and complying with other requirements, if any. Further, the application seeking

deletion of the name of Petitioner No. 1, as having retired from the partnership is also accepted and the licence shall continue in the sole name of Petitioner No. 2.

40. Petition is allowed in the above terms. There shall be no orders as to costs.

41. Copy of this Order be uploaded on the High Court website forthwith and be forwarded to learned counsel for the parties by the Court Master.

SANJEEV SACHDEVA, J

November 22, 2021
HJ

