

(1959) 07 BOM CK 0026

Bombay High Court (Nagpur Bench)**Case No:** Special Civil Application No. 126 of 1959

"Jaiswal Medical Stores"

APPELLANT

Vs

Assistant Drugs Controller

RESPONDENT

Date of Decision: July 8, 1959**Acts Referred:**

- Constitution of India, 1950 - Article 19, 226, 227

Citation: (1959) 61 BOMLR 1531**Hon'ble Judges:** Tambe, J; Raju, J**Bench:** Division Bench

Judgement

Tambe, J.

This is a petition under Articles 226 and 227 of the Constitution of India wherein the petitioner prays that (1) a writ of certiorari be issued quashing the order dated December 26, 1958, made by the Assistant Drugs Controller, respondent No. 1 hereto, and quashing the appellate order dated April 27, 1959, made by the State of Bombay, respondent No. 2 hereto; (2) a writ of mandamus directing the respondents to renew the licences of the petitioner and (3) any other suitable writ or order.

2. It is not in dispute that since about the year 1952 the petitioner has been granted licences in Forms 20 and 21 under the Drugs Act, 1940, to sell, stock or exhibit for sale or distribute drugs by retail other than those specified in "Schedules C and C(1), as well as those mentioned in Schedules C and C(1). In other words, the petitioner has been granted licences to sell, stock or exhibit for sale or distribute drugs which are both biological and special products as well as those which are not biological and special products. It is not in dispute that these licences are to be renewed every two years. The last licence granted to the petitioner in Form 21 was on November 25, 1955, and the last licence issued to the petitioner in Form 20 was on August 20, 1956. On November 24, 1957, the petitioner made an application to respondent No. 1 for the renewal of the licence in Form 21, Subsequent to the date of this

application, respondent No. 1 paid an inspection visit to the shop of the petitioner on January 21, 1958. He then by his letter (Annexure I) dated February 14, 1958, pointed out various defaults noticed by him in the inspection, one of the things noted by him was that the refrigerator in the shop was out of order and that the petitioner had not provided necessary cold storage facilities for the drugs requiring cold storage, many liver extract injectable preparations requiring cold storage were kept outside in day temperature. By this letter respondent No. 1 further pointed out that in view of the various things found by him it will not be in the public interest and in the interest of public health to grant to the petitioner a licence to stock and sell drugs. Respondent No. 1 further called upon the petitioner to explain and show cause why the application made by him on November 24, 1957, should not be rejected and why licence in Form 20 which at that time was in force should not be cancelled.

3. The petitioner by his letter (Annexure II) dated February 24, 1958, showed cause and gave his explanation in respect of the various defects found by respondent No. 1. The explanation given by the petitioner regarding the refrigerator was that it had gone out of order and the unit was sent to the Bombay Garage for repairs and its return was awaited. It was further stated "by the petitioner that he had made arrangements to keep an ice box for storage of medicines requiring cold storage and that he is keeping all liver extract and injectable preparations in it. On August 18, 1958, as two years period of the licence in Form 20 was also coming to an end, the petitioner applied for the renewal of the licence in Form 20. On August 29, 1958, the petitioner applied for the grant of fresh licences in Forms 20B and 21B to sell, stock or exhibit for sale or distribute by wholesale the drugs relating to which he had licences to sell them by retail. On October 22, 1958, respondent No. 1 again visited the shop of the petitioner and again found that various things were not in order. On October 24/25, 1958, respondent No. 1 wrote a letter to the petitioner pointing out the various defects noted by him in his inspection and "by this letter the petitioner was informed that unless satisfactory explanation is received by him within 7 days all the four applications would be rejected.

4. It will be pertinent to note that in this letter it was also observed that the refrigerator has still remained unrepaired, there was no ice in the ice box and drugs like "Whooping Cough Vaccine and Liver Extract Injections requiring cold storage were lying in a room in ordinary temperature. The petitioner by his letter dated November 3, 1958, submitted his explanation with regard to the various points raised by respondent No. 1. Regarding the refrigerator, the explanation given by the petitioner was that it was out of order and could not be repaired and that the petitioner was unable to get a new refrigerator in the market either in Nagpur or in Bombay. As regards the ice box, the explanation given was that ice in the ice box had melted just before the time the officer came for inspection. It was, however, promised that ice would be continuously kept in the ice box and thus cold storage secured for the medicines requiring cold storage. The petitioner's premises were

again inspected on December 11, 1958, and again certain defects were noticed by respondent No. 1, one of them being that there was no ice in the ice box and certain drugs requiring cold-storage were kept at ordinary room temperature. Respondent No. 1 by his order made on December 26, 1958, in the interest of public health, rejected all the four applications of the petitioner, i.e. applications for renewal of licences in Forms 20 and 21 and applications for the grant of fresh licences in Forms. 20B and 21B). Material part of the order reads as follows:

Now, therefore, I, S.E. Telang, Assistant Drugs Controller, Nagpur, in exercise of the powers delegated to me by Rule 60 of the Drugs Rules, 1945, hereby order that for the reasons mentioned in this office letter No. ADCN/sI/L-830 of, 1958, dated 23/24-10-1958, the said applications for licences to stock and sell drugs are rejected.

The petitioner took an appeal from the said order of respondent No. 1 to the: State Government which was dismissed by it, vide order dated April 27, 1959... The petitioner has, therefore, preferred this petition seeking the reliefs mentioned above.

5. The arguments advanced by Mr. P.G. Phadke, learned Counsel for the petitioner, were restricted only in respect of the grant of renewal of licences in. Forms 20 and 21. No arguments were advanced by him before us regarding: the rejection of applications for licences in Forms 20B and 21B.

6. As regards the rejection of applications for renewal of licences in Forms 20 and 21, Mr. Phadke, relying on the proviso to Sub-rule (2) of Rule 64, in the first instance contended that an application for initial grant of a licence and an application for renewal of a licence have to be treated on a different footing and the only ground on which an application for renewal of the licence could, be rejected is when the licensee has been convicted of an offence under the Act or the Rules framed under the Act or when the licence granted to the licensee has been previously cancelled or suspended and on no other ground an application for renewal could be rejected. It is not possible for us to sustain this contention raised by Mr. Phadke. We are here dealing with the topic of a licence to sell, stock or exhibit for sale or distribute drugs by retail. The-relevant provisions are contained in Rules 59 to 67 of the Rules framed under the-Drugs Act, 1940. The relevant rule which relates to applications for the grant or renewal of a licence is Sub-rule (2) of Rule 59, and it provides that applications, for the grant or renewal of a licence to sell, stock, exhibit for sale, or distribute drugs shall be made in Form 19 or Form 19A, as the case may be, to the licensing authority and shall be accompanied by a fee of rupees twenty. It is necessary to mention that for obtaining a licence in Form 20 or Form 21, or its renewal an application is to be made in Form 19. Looking to this sub-rule it is clear that the form of application provided for initial grant of a licence as well as renewal of a licence is the same. The fee prescribed for an application for initial grant of a licence as well as renewal of a licence is also the same though, no doubt, if the application for renewal is made beyond the period of duration of the subsisting

licence, penalty also is imposed. These applications are to be dealt with in accordance with the provisions of Rule 64. Rule 63 provides that licences to sell drugs shall, unless sooner suspended or cancelled, be in force for two years from the date of issue provided that if application for a fresh licence is made before the expiry of the period of validity of the licence, the licence shall continue to be in force until orders are passed on the application. It is obvious that the application referred to in the proviso to Rule 63 is the application for renewal of the licence. The rule in terms mentions it as an application for a fresh licence. It is thus clear that on the language of the rule as well as that of the provisions of Sub-rule (2) of Rule 59 the rule making authorities have treated an application for a licence and an application for the renewal of a licence on the same footing. The conditions required to be fulfilled by the applicant for the grant of licence are contained in Rule 64(1). We will advert to them later. There can be no doubt that they are in the interest of public health and must be satisfied by him to the satisfaction of the licensing authority. There is then no good reason to assume that these conditions need not be fulfilled to the satisfaction of the licensing authority by the licensee at the time of the renewal of his licence. We also see nothing in the language of the proviso to Sub-rule (2) of Rule 64 to sustain the argument that an application for renewal has to be treated on a different footing than an application for initial grant of licence, or that renewal of licence could be refused only when conditions mentioned in the proviso exist. The proviso in terms has application both to the initial grant as well as to the renewal of a licence.

7. This question previously arose for decision before a Division Bench of this Court in *Jayantilal Sampatlal Jayaswal y. The State of Bombay* (1958) Special Civil Application No. 1160 of 1058 decided by Vyas and Tambe, JJ. on August 8, 1958 (Unrep.) to which one of us (Tambe J) was a party. In the judgment it was observed:

... In our view, Rule 64 relates both to the initial grant of licence as well as to the renewal of the licence. The words of the proviso itself "may refuse to grant or renew", on which reliance was placed, show that the whole Rule 64 relates to the initial grant of the licence as well as renewal of the licence. To interpret otherwise would mean that though a person may not be entitled to an initial grant of licence on account of his failure to satisfy the conditions of Rule 64, yet he would be entitled to get his licence renewed.

We see no reason to take a view different from that taken in that case.

8. It is, therefore, not possible for us to accept the contention of Mr. Phadke that the application for renewal of licence could only be rejected if the conditions mentioned in the proviso to Sub-rule (2) of Rule 64 exist and not otherwise. In our opinion, Rule 64(i) governs both application for initial grant of licence as well as application for renewal of licence. It is not the case of either party that the case falls under Sub-rule (2) of Rule 64. The case falls according to the respondents within Sub-rule (1) of Rule 64. Material part thereof reads as follows:

Conditions to be satisfied before a licence in Form 20, 20B, 21 or 21B is granted:

(1) A licence in Form 20, 20B, 21 or 21B to sell stock or exhibit for sale or distribute drugs shall not be granted to any person unless the authority empowered to grant the licence is satisfied that the premises in respect of which the licence is to be granted are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and are in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs.

It is very strenuously contended on behalf of the respondents that on the facts found the case falls within Sub-rule (1) of Rule 64. On behalf of the petitioner it is equally strongly contended that even assuming that it was open to respondent No. 1 to reject the application for renewal of licence on account of non-compliance of the conditions mentioned in Sub-rule (1) of Rule 64, yet the rejection of the applications of the petitioner had not been on that ground. The rejection had been on account of non-compliance of the provisions of the Drugs Act, 1940, and rules framed thereunder and also on account of non-compliance of the conditions of the licence granted. It is the contention of Mr. Hiadke that on this ground the application for renewal cannot be rejected. It must be conceded that the order made in this case is not happily worded. We have already reproduced the operative part of the order made on December 26, 1958, This order does not specifically mention the reasons for rejection of the application for renewal. It is stated there that for reasons mentioned in the letter of October 24, 1958, the applications of the petitioner are rejected.

9. This brings us to the letter of October 24, 1958. The facts found by respondent No. 1 and mentioned in that letter are:

(1) Schedule E and H drugs i.e. Poisons are not stored by you in a separate cupboard under lock and key Some drugs which are not poisons have also been kept in the cupboard in which poisons are kept.

(2) Refrigerator which as informed by you on December 12, 1957 was sent for repairs, has not been received back by you.

(3) There was no ice in the ice-box and you were stocking for sale drugs like Whooping Cough Vaccine and Liver Extract Injections at ordinary room temperature in that ice-box without providing any cold storage facilities for the drugs.

(4) Records and registers required to be maintained under Drugs Rules, 1945, have not been maintained by you at all. Statement made by you in this connection in your reply dated February 24, 1958 is not correct. No record has been maintained of the retail sales of spirituous medicines containing 3 per cent, or more of alcohol.

(5) Qualified person Shri Motilal Mohanlal Jaiswal was absent. He came later and the premises were in the meantime in charge of other persons who have not been

approved as qualified persons. In this connection, I have to state that your statement as made in your letter dated February 24, 1958 that your Shri Jayantilal Shah is a qualified person is not correct. Name of Shri Motilal Mohanlal Jaiswal alone appears in the space for names of qualified persons in your licences in Forms 20 and 21.

10. It is urged by Mr. Abhyankar, Special Government Pleader, that the facts found in items 2 and 3 are that the refrigerator was out of order and that there was no proper arrangement made for keeping medicines requiring cold storage in the ice-box. It thus shows that there was no adequate and proper storage arrangement for preserving the properties of the drugs made by the petitioner Respondent No. 1 was, therefore, entitled to reject the applications in terms of Sub-rule (1) of Rule 64. It is also contended by Mr. Abhyankar that other facts found show that the petitioner was contravening provisions of certain rules in the conduct of his business and he was, therefore, not a competent person in the opinion of respondent No. 1 to supervise and control the sale, distribution and preservation of drugs. It is true that the facts found relating to the conditions of the refrigerator and the ice-box show that the petitioner was not in a position or was unable to satisfy one of the requisite conditions mentioned in Sub-rule (1) of Rule 64 at the time he appealed for renewal of his licence. But it is not possible for us to accept the argument of Mr. Abhyankar that from the other facts found we should hold that the petitioner is not a competent person to supervise and control the sale, distribution and preservation of drugs. Contravention of rules may in certain cases be deliberate, in certain other cases it may arise out of incompetence or negligent supervision. It is not the question of the satisfaction of this Court. What is really material under Sub-rule (i) of Rule 64 is the satisfaction of the authority granting the licence. It may have been open to respondent No. 1 to reach a conclusion on those facts that the petitioner was not a competent person to supervise and control the sale, distribution and preservation of drugs, but he has not found so. We are, therefore, not inclined to accept Mr. Abhyankar's contention that respondent No. 1 has rejected the application on the ground that the petitioner is not a competent person to supervise and control the sale, distribution and preservation of drugs.

11. The tenor of the letter dated October 24, 1958, shows that in the opinion of respondent No. 1 reasons for refusing the licence were (1) inadequate arrangements for storing drugs requiring cold storage (items 2 and 3) and (2) certain other contraventions on the part of the petitioner of the provisions of the Act and rules framed thereunder (items 1, 4 and 5).

12. Now, on the language of Rule 64, the opinion of the licensing authority that the licensee has contravened any of the provisions of the Act or the rules does not afford a ground to refuse renewal of a licence. The grounds on which renewal of licence could be refused are the inability of the licensee to fulfil the conditions mentioned in Rule 64(1) to the satisfaction of the authority concerned and the

conviction of the applicant of an offence under the Act or rules or previous cancellation or suspension of his licence. The difference between the two is of a substantial nature. In case a person is prosecuted for having contravened any of the provisions of the Act or rules he has an opportunity of defending himself in a Court of law and in case his licence is cancelled or suspended he has again a remedy in a Court of law by way of an appeal to the District Court. These provisions thus afford him safeguards before he is deprived of his business. There would be no such safeguard if the licensing authority refuses renewal of the licence on the ground that in his opinion the licensee has contravened the provisions of the Act or the rules. It must be kept in view that Article 19(1)(g) of the Constitution guarantees to the citizen of India the right to practise any profession, or to carry on any occupation, trade or business. Exercise of this right can of course be subjected to certain restrictions but only to the extent and in the manner provided, in Clause (6) of the article. And when we turn to the material part of the said. Clause (6) we find that restrictions on the exercise of this right could only be imposed by enacting a law in the interests of public and further that the restrictions imposed by law are reasonable. It cannot be disputed that the Drugs Act imposes restrictions on the exercise of a citizen's right to carry on trade or business in drugs. The authorities appointed under the Act, therefore, would not be justified in imposing any restrictions on the exercise of the aforesaid right by a citizen which are not authorised by the provisions of the Act. or the rules made thereunder. As already stated the opinion of the licensing authority that the licensee has committed a breach of any of the provisions of. the Act or any of the rules framed under the Act by itself is not a ground, under Rule 64 for refusing renewal of a licence. In our opinion, therefore, respondent No. 1 was in error in taking into consideration the alleged breaches, of the provisions of the Act and the rules mentioned in items 1, 4; and 5 of his letter dated October 24, 1958, in rejecting the two applications of the petitioner for renewal of licences in forms 20 and 21.

13. It is next to be seen whether the order of respondent No. 1 refusing to grant; licence is thereby vitiated. From the facts stated above refusal to renew the licence is not solely founded on the ground of alleged contravention on the part of the petitioner of the provisions of the Act or rules made thereunder mentioned in items 1, 4 and 5 of letter dated October 24, 1958. The refusal is also founded on the ground that the refrigerator was not in order, that there had been no proper arrangement made for keeping in cold storage drugs required to be kept in cold storage for the preservation of their properties. Looking to the language of Sub-rule (1) of Rule 64 it would be seen that two conditions are required to be satisfied by the applicant before a licence could be granted to him and those conditions are that the "licensing authority must be satisfied that the premises are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and that the premises must be in charge of a person competent in the opinion of the licensing authority to supervise and control the sale,

distribution and preservation of drugs. In the instant case, respondent No. 1 was not satisfied that the petitioner's premises were equipped with proper storage accommodation for preserving the properties of the drug to which the licence applies on account of the failure on the part of the petitioner to provide a refrigerator or an ice-box for storing the drugs required to be kept in cold storage. In the circumstances of the case, it cannot be said that the aforesaid conclusion reached by respondent No. 1 is capricious. The premises of the petitioner were visited by respondent No. 1 on January 21, 1958. It was found that the refrigerator was out of order. The premises were again inspected on October 22, 1958. The refrigerator remained unrepaired. The petitioner had promised to make adequate arrangements to keep certain drugs in cold storage by providing an ice-box. The undertaking given by the petitioner was found not to have been fulfilled. The premises were again visited on December 11, 1958. The conditions remained just the same. For a period of nearly 12 months there were no satisfactory arrangements made by the petitioner to keep in cold storage drugs required to be kept in cold storage for preservation of their properties. In these circumstances, in our opinion, it cannot be said that respondent No. 1 acted in any capricious manner in reaching the conclusion that the premises were not equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies. This being the position, on the language of Sub-rule (1) of Rule 64, which is mandatory in form, no option was left to respondent No. 1 but to reject the aforesaid two applications of the petitioner for renewal of licences in Forms 20 and 21. In our opinion, therefore, it cannot be said that respondent No. 1 was in error in rejecting the aforesaid applications of the petitioner. For reasons stated above, in our judgment, the petitioner is not entitled to any of the reliefs claimed by him. 14. In the result, the petition fails. The rule is, therefore, discharged with costs.