

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

WP No. 1521-P/2021

Muhammad Anwar and others.

.....Petitioners.

V/s

Govt. of KPK Peshawar
Through Chief Secretary,
Peshawar and others.

.....Respondents.

For the Petitioners:

Mr. Adeel Anwar Jehangir,
Advocate.

For the Respondents:

M/s Muhammad Bashir Naveed
AAG & Rahat Ali Khan Nahaqi
Assistant Attorney General
along with Abbas Khan DG
Drugs & Ibrahim Deputy
Secretary Drugs.

Date of hearing:

14.05.2024

JUDGMENT

SYED ARSHAD ALI, J:- This consolidated judgment is aimed at deciding the instant petition as well as connected petitions, details whereof have been provided in Annexure 'A' to this judgment, as essentially adjudication of common questions of law and facts are involved in all the petition.

Writ Petition No. 1521-P & 4255-P/2021

2. Brief facts as narrated in the petitions are that the petitioners are qualified Category B Pharmacists/Dispensers and Category C Apprentices who have been running their medical stores for the last 20/30 years under licences regularly renewed till 2017. Petitioners contend that when they applied to the respondents, their applications were turned down citing as ground the impugned amendments in the NWFP Drugs Rules 1982 through notification dated 09.05.2017. They further allege that in a meeting following protests against the rejection of applications for renewal, the then Chief minister and Health minister on 24/05/18 agreed to arrange an examination for the applicants to be conducted by Provincial

Pharmacy Council, which, if qualified, would entitle them for receipt of license under Category B . They add that despite the above assurance the respondents never conducted the exam as promised, and consequently, did not renew licenses of the applicants. Petitioners have prayed for renewal of licenses, striking down of KPK Drug Rules, 2017, and for leave to the applicants to appear in the exam to be conducted by Provincial Pharmacy Council.

WP No. 926-M/2018 & WP No. 88-M/2020

3. Petitioners in this petition run drug retail stores in Malakand division. They are holders of category C license; they pray for striking down Notification dated 09.05.2017 to the extent of serial No. 7 (e) whereby rule 18(1) along with Form No. 8(B) being ultra vires the Constitution.

Writ Petition No. 927-M/2018

4. Petitioners have drug retail stores in Malakand under a Category C license. It is alleged that their shops were recently raided for non-renewal of licenses, and despite the fact that of their applications for renewal being pending, their shops were sealed. Aggrieved with the actions of the respondents, they seek a writ of mandamus directing the respondents into renewal of their licenses.

Writ Petition No. 2852-P/2018

5. It is purported/alleged that Petitioners No. 1 to 5 are holders of degree of Bachelor of Pharmacy from the recognized universities whereas petitioner No.6 is Association duly registered under the Societies Registration Act, 1860, however, they have filed the instant petition with the following prayer:-

"It is, therefore, humbly prayed that on acceptance of this writ petition, this honorable court may declare, hold and direct:-

- 1. That paragraph 2 and paragraph 3 in rules introduce by virtue of notification No. SO (Drug) HD/2-43/2018 dated 10.05.2018 and further amendments in vide Notification No. So (Drugs)/HD/2-43/2018 dated 04.10.2019 are patently illegal, without lawful authority, in excess of*

jurisdiction and based on mala fide, therefore, not sustainable.

- II. That the amendments proposed and/or made in rule 18 adding proviso is patently in negation of the spirit of the act and respondents cannot be allowed to make such amendments illegally and unlawfully.*
- III. That the amendments made in the rules will destroy the main object of the act, therefore, liable to be declared unlawful and of no legal effect.*
- IV. That the petitioners have been condemned unheard and the notification dated 10.05.2018 & 04.10.2019 have been issued and notified in negation of article 10-A of Constitution of Islamic Republic of Pakistan therefore, not binding upon the right upon the right of the petitioners.*
- V. Any other appropriate remedy not specifically prayed for may also be granted deemed appropriate in the circumstances by this honorable court”.*

Writ Petition No. 323-M/2020

6. The petitioners, who allegedly run their medical stores at different parts District Swat, have approached this Court through the instant petition with the prayer to declare the petitioners entitled to run their medical stores under the customary ‘Riwaji’ licenses issued on Form-9 Rule 15(1) of Drug Rules, 1982 and to issue necessary mandamus to the respondents for renewing their current licences.

Writ Petition No. 89-M/2020

7. The petitioners, who allegedly/purportedly run their medical stores at different parts of District Swat and holders of licences under Category-C, have approached this Court with the prayer to declare them entitled to run their medical stores under the current category by issuing necessary mandamus to the respondents for renewal of their current licences.

8. The precise assertions of the learned counsels for the petitioners in these cases are that the practice of Pharmacy is regulated through Pharmacy Act, 1967 (“Act of 1967”). While referring to section 25 of the Act of 1967, the learned counsels have argued that the qualification for registration as Pharmacist or as an apprentice in pharmacy has been acknowledged and recognized under the Act of 1967 and one of the qualifications is that the person, who passed the examination in pharmacy held by the Provincial Council can

be registered with the Provincial Council, therefore they have the right to practice the business of pharmacy. On the dint of such qualification they were issued licences for sale of drugs at their retail point through rule-18 of the then NWFP Drug Rules, 1982 ("**Rules, 1982**"); However, through the impugned amendment in the Rules, of 1982, the persons who have not passed the examination in pharmacy held by a Provincial Council as provided under section 25 (c) of the Act of 1967 have been barred to deal in the sale of life saving drugs and thus the effect of the said rules is that the licence issued to the petitioners were not renewed.

9. To sum up the contention of the learned counsels for the petitioners; once under the Rules, 1982 license is granted then subsequently a subsequent amendment in the Rules cannot deprive the license holders of their right to do and enter the lawful business which is one of their fundamental rights guaranteed through Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**").

10. On the other hand, the worthy AAG along with representative have argued that the amendment to the rules was made only after all relevant stakeholders had been consulted, and after they had ascribed their approval to it in wider public interest. The learned AAG has also stated that the amendment in the rules was made pursuant to the direction of the superior courts including this Court as well as the Apex Court wherein the Governments were directed to frame comprehensive rules/regulations to deal with the menace of sale and availability of spurious/ substandard drugs, besides, the qualification of the persons, who are dealing with the said business.

11. Arguments heard and record perused.

12. The matter regulating the subject of practice of pharmacy is being governed under the Act of 1967. The Act of 1967 provides for establishment of the Pharmacy Council at Centre (section 4) and the Provincial Council of Pharmacy

(section 5). It is one of the obligation of the Provincial Council to prepare and maintain Registers of Pharmacists and Apprentices in Pharmacy and to register Pharmacists and grant certificates of registration, beside, to conduct examinations for the purpose of registration as Pharmacists (section 23). Section 24 of the Act of 1967 deals with preparation and maintenance of Registers by the Provincial Council; whereas qualification for registration as a Pharmacist or as an Apprentice in Pharmacy is provided under section 25 of the Act of 1967.

Relevant provisions of the Act of 1967 read as under: -

24. Preparation and maintenance of Registers.-

(1) The Provincial Council prepare or cause to be prepared and maintained the following Registers of Pharmacists and apprentices for the Province, namely:-

- (a) Register A- in which shall be registered the persons specified in clause (a) of sub-section (1) of section 25;
- (b) Register B- in which shall be registered the persons specified in clauses (b) and (c) of the said sub-section; and
- (c) Register C- in which shall be registered the apprentices in pharmacy;

Provided that the Provincial Council may, with the previous approval of the Provincial Government, discontinue the registration of apprentices in pharmacy and may, with like approval re-open such registration after it has been discontinued and shall, upon such discontinuance or re-opening, publish in the official gazette a notice there of specifying the date of such discontinuance or re-opening.

(2) Every Register prepared and maintained under sub-section (1) shall include the following particulars relating to a person registered, namely:

- (a) full name;
- (b) residential address;
- (c) professional address;
- (d) father's name;
- (e) date and place of birth;
- (f) nationality;
- (g) qualification;
- (h) date on which registered; and
- (i) such other particulars as may be prescribed by bye-laws.

25. Qualifications for registration as a pharmacist or as an apprentice in pharmacy.— (1) The following persons shall, subject to the provision of sub-section (3), be qualified for registration as pharmacists under this Act, namely:—

- (a) persons who hold a degree in pharmacy conferred by a University or an institution affiliated thereto,

where the degree is recognised by the Central Council;

(b) persons who hold a diploma in pharmacy granted by any institution recognised by the Central Council; and

(c) persons who pass the examination in pharmacy held by a Provincial Council

13. However, import, export, manufacturer, store, distribution and sale of drugs is governed by the Drugs Act, 1976 ("Act of 1976"). Section 6 of the Act of 1976 is relevant to the present controversy, which reads as under:-

6. Regulation of sale of drugs.-The Provincial Governments shall regulate the sale of drugs in the prescribed manner and may for that purpose make such orders, and issue such directions to the importers, manufacturers, stockists, retailers or other dealers of drugs, as they may deem fit.

14. Similarly, section 44 of the Act of 1976 empowers the Provincial Government to make rules, inter alia, to provide the conditions to regulate sale or storage or distribution of drugs or any specific drug class of drugs, and also for the form of licences for the sale or distribution of drugs. In exercise of its mandate under section 44 ibid, the Provincial Government framed rules known as NWFP (now Khyber Pakhtunkhwa) Drug Rules, 1982. Part-III of the said rules relates to the type of licences to sale the drugs and the licensing authority. According to rule-12 the Secretary to Government of Health Department is the licensing authority whereas the types of the licences are as follows:-

- (i) Licence to sell drugs by way of retail sale;
- (ii) Licence to sell drugs by way of wholesale;
- (iii) Licence to sell narcotics; and
- (iv) Licence to sell drugs in a pharmacy.

15. Further under rule-17 it is envisaged that the licences stated above are to be issued for the period of two years. The pre-condition for issuance of licence is provided under

rule-18. Relevant to the present controversy is the un-amended rule-18(2), which reads as under:-

18. Pre-conditions of the issue of licence.-

(1).....

.....

(2) *The sale of drugs shall be supervised----*

(a) *Under licence in Form 9 or Form 11 by a person-*

(i) *Who registered under section 24(1) (a) and (b) of the Pharmacy Act, 1967 (XI of 1967) or*

(ii) *Who was approved as qualified person for grant of drug sales licence under the West Pakistan Drug Rules 1958 or*

(iii) *who was on the 19th day of June, 1972 qualified for registration under section 24 (1) (b) of pharmacy Act 1967 (XI of 1976); or*

(iv) *Who has before the commencement of these rules passed the examination, of compounder or dispenser and has completed two years period of apprenticeship under section 24(1)(c) of the Pharmacy Act, 1967*

(b) *Under license in Form 10 by a person*

(i) *who fulfils the conditions laid down in clause (a), or*

(ii) *Who has been a student or apprentice in pharmacy under clause (iii) of sub-section (2) of section 25 of the Pharmacy Act, 1967 (XI of 1967);*

Provided that this provision shall be applicable after 2 years of the commencement of these rules;

(c) *under licence in Form 12 by a person who is registered as pharmacist under section 24 (1) (a) of Pharmacy Act, 1967 (XI of 1967) or by a person who is registered under section 24 (1) (b) of Pharmacy Act, 1967 (XI of 1967) and possesses at least 3 years experience in compounding.*

16. The present controversy stems from the notification dated 09.05.2017 issued under section 44 of the Act, 1976 whereby rule-18 was amended. The amendment which is germane to the present controversy is rule-18 (1) (e) which reads as under:-

7. For rule 18, the following shall be substituted, namely:

(1) *The Licensing authority shall not issue licences, unless,-*

(a).....

.....

.....

(e) *in case of Pharmacy and distribution, the proprietor has appointed a person registered under clause (a) of sub-section (1) of section 24 of the Pharmacy Act, 1967 (XI of 1967) while in case of medical store a qualified person registered under*

clauses (a) and (b) of sub-section (1) of section 24 of the Pharmacy Act, 1967, to personally supervise the sale of drugs;

17. One of the effect of the said amendment is that apprentices as defined under section 24 (c) who were previously entitled to a licence to manage a medical store, are/were excluded from the category of individuals qualified to obtain a license for the business of sale of drugs, a condition precedent. .

18. It is the precise contention of the petitioners that since before the amendment in the Rules, 1982, they were doing a lawful trade/business; hence, they have a vested right in terms of Article 18 of the Constitution to continue with this business and that the said right cannot be taken away from the petitioners through the impugned amendment in the rules.

19. The rule of 2017, as stated above, in rule-12 envisages for different kinds of licences entitling them to do the business of sale of drugs at a retail point/pharmacy and the effect of amendment is that they would not be entitled to renewal of licence as by the amended rules they are not qualified to conduct the business of sale of drugs in the pharmacy.

20. Undoubtedly, Article 18 of the Constitution guarantees rights to the citizen to enter upon any lawful profession or occupation and to conduct any lawful trade or business but the said right is not unqualified as Article 18 starts with the word subject to such a "qualification", if any. Moreover, the proviso attached to the article clearly empowers the legislature to regulate any trade or business and it is always assumed that such regulations may be by license.

21. The meaning connotation of the word 'licence' cannot be expanded beyond a mere a privilege as it is not a right in its strict sense. Explaining the concept Justice Retd Fazal Karim notes: "The ordinary dictionary meaning of expression 'licence' as contained in the Concise Oxford Dictionary is: "permit from government etc to marry, print something,

preach, carry on some trade (especially that in alcoholic liquor) etc”.

22. The definition and general nature of a licence is thus stated at page-32 of the 33rd Vol. of the American Jurisprudence: “in its specific sense, to licence means to confer on a person the right to do something which otherwise he would not have the right to do. A licence is in the nature of a special privilege rather than a right common to all and is often required as a condition precedent to the right to carry on business or to hold certain classes of property within the jurisdiction”.¹

23. A similar question arose before the Apex Court in the case of *Zamir Ahmad Khan*². The facts of the case were that section 3(1) of Act No. XXXIX of 1950 confers power upon the Federal Government to prohibit, restrict or otherwise control, the import and export of goods of any specified description. The issue in that case was that the cinematograph films was an importable item in the free list which could be imported by private persons, however, in the manner as provided under the Act which, inter alia, included the licensing system. The respondent in the case had applied for a licence for certain cinematograph films which were borne on the free list and deposited certain amount for that purpose, however, before the proper licence could be issued, an amendment was introduced in the Import Policy on 09.08.1972 and the effect of the said amendment was that from the date of amendment, cinematograph films could be imported from abroad only through an official agency to be named by the Ministry of Information and Broadcasting and private importers were disqualified from importing the same. As a result of the said amendment, the Licensing Authority declined to authenticate the licence in favour of the respondent. It was the claim of the respondent that by applying

¹ Judicial Review of Public Actions by Justice (R) Fazal Karim page-728

² Government of Pakistan through Secretary, Ministry of Commerce and another vs. Zamir Ahmad Khan (PLD 1975 Supreme Court 667)

for licence and depositing the required fee, a vested and fundamental right had accrued in his favour which could not be taken away through the said amendment. In this background regarding the meaning of the licence, it was observed by the Apex Court that it is well settled that in generality of cases, licence (simpliciter) is a privilege and not a legal right; much less there is a legal duty for its grant. Therefore, exceptional cases apart, mandamus would not issue in such cases. Speaking generally in such cases the emphasis is on policy, and any discretion vesting in the authorities is directed towards attaining the policy objective. In the concluding paragraph, the Apex Court had observed that:

"In the instant case, as already pointed out, section 3(1) of the 1950 Act reserves to the Central Government power of the widest amplitude to prohibit, restrict or otherwise control the import of goods. What goods are to be imported, how and in what quantities and by whom they are to be imported are all questions of policy to be laid down by the Federal Government. Indeed, the Government has all along since the inception of the Act, frequently and materially altered import policies. These policies, availability of foreign exchange and multitudes of other factors of which the Federal Government is the sole arbiter in exercise of its executive authority. The decision taken, falls within the realm of policy making. These policy decisions are binding on the subordinate administrative authorities as a matter of duty. In all such cases, orders made must conform to the policy decisions of the Government. The amendment made on 10.8.1972 in item No. 49 signified a change in policy and the respondent was informed that he was being refused licence because of "the change in policy" and not because of any other reason. On these facts, it is not possible to subscribe to the proposition that a writ of mandamus would lie against the Licensing Authority which would have the effect of defeating the policy, competently made by the Federal Government. Accordingly, I would answer the second question on which leave was granted, also in the negative".

24. The leading American authority on the point is what is known as Slaughterhouse cases³ in which a challenge to a Louisiana legislation of 1869 to clean up the Mississippi River was repelled. The legislation was aimed at preventing the pollution and the resulting contamination of the city's water supply. The Act prohibited all landing and slaughtering of livestock in the city or surrounding parishes except at one large slaughterhouse which was granted an exclusive franchise for 25 years. The Act also established maximum rates to be charged for the land and slaughtering of livestock a group of small independent slaughterers which had been displaced by the legislation challenged the Act on the ground that it violated the 13th and 14th Amendments in taking away their livelihood. The court rejected any notion that the butchers' right to practise their profession constituted one of the privileges and immunities of citizens of the United States alleged to be protected from state infringement by the 14th amendment.

25. In Ganapati's case⁴, it was held that if there is a grant, revocation or withholding of a licence or a permit for the carrying on of a trade, business or profession, such law can be challenged as violative of fundamental right, however, at the same time, it was observed by the Indian Supreme Court in the case of Cooverji⁵ that the said right will not apply to trade or business which is inherently dangerous to the community and which the state is entitled either to prohibit entirely or to permit only under such condition as will minimise harm likely to cause from such enterprises. Therefore, the running and carrying on of a business under a license system does not confer upon a licensee the right to continue with the said business, if in the opinion of the state or government the said

³ 83 US 36; 21 L Ed 394
Judicial Review of Public Actions by Justice @ Fazal Karim page-732

⁴ Ganapati vs The State of Ajmir (AIR 1955 SC 188)

⁵ Cooverji Vs Excise Commissioner (AIR 1954 SC 220)

business may endanger or is likely to endanger the public health and safety.

26. In the present cases, even if we assume that on the dint of un-amended rules, the petitioners were allowed to enter into the trade/business of sale of drugs at the sale point on the basis of their qualification as provided under section 25(c) of the Act of 1967; it is the case of the respondents in their comments that since long there was a debate regarding the eligibility of persons holding license under category-C (section 25) to deal with the sale of drug by way of retail. It is further alleged that under section 2(f)⁶ of the Act of 1967 the petitioners holding apprentice in register-C can not be declared as pharmacist/qualified person, therefore, grant of licence to a person registered in category-C *ibid* is against the provisions of Act of 1967. It is further explained in the comments that Drugs Rules framed in 1982 were considered grossly deficient as it does not provide explanation of important segment to cope with present scenario and challenges. It has been observed on various occasions not only by Provincial Quality Control Board (PQCB) while scrutinizing case of Drug Inspector but this Court too has issued directive for necessary tweaking of existing law to ensure quality of drugs available for retail. The Federal Government conveyed the directions of the Supreme Court of Pakistan Islamabad, *inter alia*, to the Health Department of all the Provinces to take immediate measure to implement the Act Plan, which was designed after series of Inter Provincial meetings for implementation of recommendations. In the Action Plan, it has been emphasized to amend and update the rules to ensure the availability of safe efficacious and quality drugs to ailing masses. In short, the amendments were prompted by valid concerns, the Rules, 1982 were amended with the consensus of all the stakeholders including PCDA

⁶ 'Pharmacist' means a person who is registered under section 24 in register A and Register B.

provincial chapter before the same was notified in official gazette. The area of amendment, inter alia, deals with the following matter:-

- i. *The method of purchase from authorize agent by retailer and is further sale is regularized to ensure its traceability/proof of purchase.*
- ii. *Storage and distribution of medicine are well explained.*
- iii. *Restraining the non-qualified personnel to supervise and carryout the sale of drugs.*
- iv. *Restraining the manufacturers/distributors not to sell drugs to any unlicensed premises/retailers to discourage the mushroom growth of unlicensed premises.*
- v. *Clear dimension/specification even color of the sign board for various premises whether medical store/pharmacy distribution are given on the basis of qualified person who will supervise the sale in respective premises.*
- vi. *To ensure presence of qualified person to supervise sale of drug to avoid the possibility of any error/misuse.*
- vii. *Displaying original category registration on basis of which drug sale license issued, to avoid its renting out for grant of license to another premises thus mitigating the chances of duplication.*

27. Thus, it appears that the amendment was brought in the Rules, 1982 in the public interest as sale of drugs by non-qualified person would endanger the lives of the public.

28. We have also considered the ratio of the Apex Court in the case of *Arshad Mehmood*⁷. In the said case, the vires of section 69(1) of the Punjab Motor Vehicles (Amendment) Ordinance (XLVI of 1999) was challenged on the touchstone of Article 8 and 18 of the Constitution. It was the case of petitioners before the Apex Court that they had a permit to ply stage carriages in different cities of the Province and the effect of amendment in section 69-A was that section 69-A, inter

⁷ *Arshad Mehmood and others vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 Supreme Court 193).*

alia, envisaged for grant of a franchise to the stage carriages with carrying capacity of 70 or more passengers by a bus service providing and maintaining the prescribed facility on routes in respect of which it is declared by the Government that only a bus service of the nature referred to above shall be allowed to obtain stage carriage thereon to the exclusion of other stage carriages. The definition of stage carriage under the Punjab Motor Vehicles Ordinances provided a vehicle having the capacity of six seats except the driver for passengers. The said provision was struck down by the Apex Court on various grounds with directions for legislation, however, the judgment is distinguishable for the reasons that the impugned legislation had allowed a class of people to monopolize the business of transport whereas in the present case, the object of the impugned amendment is obvious because the sale of drugs at a Pharmacy is a very sophisticated calling for specialized scientific expertise and thus the requirement for essential qualification for the sale of drugs. Any person, who is not qualified in the field of pharmacy, if allowed to sale drugs to the public at the pharmacy or sale point, it may jeopardize health of the consumer public.

29. The impugned decision of the Provincial Government amending the rules, in our opinion, is a policy matter of the Province and has been made in the large interest of the people, therefore, is a reasonable qualification prescribed by the law for entering into a lawful trade/business. It is noteworthy that back in 1980's when the rules were first passed, there was a dearth of qualified pharmacists, hence, the laxity in qualifications for drug retail license. However, today, situation is substantially different, and pharmacy graduates are neither hard nor costly to find, therefore, prohibiting the carrying of the said business by unqualified persons is in public interest and the qualification so prescribed by the Government through impugned legislation qualifies the test of reasonableness,

therefore, we are not inclined to interfere in the said policy decision of the Government.

30. Resultantly, all these writ petitions having no merit and are accordingly dismissed.


Judge


Judge

Date of hearing and announcement
of judgment..... 14.05.2024

Date of preparation and signing
of judgment..... 22.07.2024

Annexure 'A'

S. No.	Particulars of the case
1.	WP No. 1521-P/2021 "Muhammad Anwar and others vs. Govt. of Khyber Pakhtunkhwa".
2.	WP No. 926-M/2018 "Pakistan Chemist and Druggist Association Malakand Division and others vs. Govt. of Khyber Pakhtunkhwa and others".
3.	WP No. 927-M/2018 "Pakistan Chemist and Druggist Association Malakand Division and others vs. Govt. of Khyber Pakhtunkhwa and others".
4.	WP No. 2852-P/2018 "Farmanullah vs. Govt. of Khyber Pakhtunkhwa".
5.	WP No. 323-M/2020 "Naveed Zafar and others vs. Govt. of Khyber Pakhtunkhwa and others".
6.	WP No. 88-M/2021 "Swat Chemist and Druggist Association District Swat and others vs. Govt. of Khyber Pakhtunkhwa and others".
7.	WP No. 89-M/2021 "Swat Chemist and Druggist Association District Swat and others vs. Govt. of Khyber Pakhtunkhwa and others".
8.	WP No. 4255-P/2021 "Hashmat Ali and others vs. Govt. of Khyber Pakhtunkhwa through Chief Secretary, Peshawar and others".

