



09/12/2021	<p>Mr. Siddharth Gupta and Mr. Pranjal Agrawal, Advocates, for Petitioners. Mr. Ramakant Mishra, Assistant Solicitor General, assisted by Mr. Tushar Dhar Diwan, Advocate, for Respondent No.1. Ms. Samiksha Gupta, Panel Lawyer, for Respondent No.3.</p> <p>The present Writ Petition has been filed aggrieved by two separate Orders issued by Respondent No.1, viz. Order dated 17.7.2019 (Annexure P-3) and Order dated 9.9.2019 (Annexure P-4).</p> <p>Vide the two Orders, the Respondent No.1 has imposed a moratorium/ban on the opening of the new Colleges and Institutions for imparting B.Pharm and D.Pharm courses in the entire Country for a period of five years.</p> <p>Respondent No.1 - Pharmacy Council of India, the contesting Respondent, has submitted its reply.</p> <p>Considering the nature of dispute and the contentions put forth by Respondent No.1 in its reply, the arguable issue has been made out and therefore the present Writ Petition is admitted for hearing.</p> <p>Learned Counsel for Petitioners has insisted for grant of interim relief.</p> <p>Accordingly, I.A. No.1, which an application for grant of interim relief, is taken up for consideration.</p> <p>By way of interim relief, the Petitioners have sought for the stay on the effect and operation of the aforesaid two Orders dated 17.7.2019 and 9.9.2019.</p> <p>In the alternative, the Petitioners have sought for an interim direction to the Respondents to facilitate the Petitioners to apply for necessary approval and sanction for opening of a new Pharmacy institution imparting B.Parm and D.Pharm courses and further to direct the Respondents to accept, process, scrutinise and submit a report on the basis of the scrutiny so far as the entitlement for grant of necessary sanction and approval for the opening of a new Pharmacy institution are concerned.</p>



Petitioners have primarily challenged the two Orders on the following grounds:

Firstly, the same being an act by which the fundamental right under Article 19(1)(g) guaranteed under the Constitution of India to Petitioners being violated.

Secondly, it was contended that the action of Respondent No.1 in the passing of the two Orders is *per se* in contravention to the provisions of the Pharmacy Act, 1948.

The third contention of the Petitioners is that there is no rationale on the part of Respondent No.1 in the issuance of the two Orders, as there is no sufficient reason available with Respondent No.1 in the process of passing of the two Orders.

It was also the contention of the Petitioners that the two Orders do not have any force of law, for the reason that *firstly* they are not supported with any of the provisions of the Pharmacy Act nor could these Orders be considered as a regulation as they have not been notified in any of the official Gazettes.

Further, the Pharmacy Act does not provide the Council any such power to impose a total moratorium/ban on the establishment of the new Colleges to impart B.Pharm and D.Pharm courses and for the said reason also the two Orders amount to be orders in excess of jurisdiction and without there being any power assigned upon the Authority for passing of the same under the law governing the field.

Next contention of the Petitioners is that the entire Act speaks of the Respondent No.1 issuing regulation, regulating the courses of B.Pharm and D.Pharm and the Institutions imparting the said courses. However, at the same time, the Respondent No.1 is not empowered to impose a ban on the establishment of the new Colleges and Institutions imparting the courses of Pharmacy. The same could have decided only by the Government and not the Agency monitoring the Pharmacy institutions.

The following decisions have been relied upon by the Petitioners in respect of their contentions:

1. 1987 (1) SCC 658
2. 2000 (3) SCC 40
3. 2004 (2) SCC 510
4. 2004 (9) SCC 461



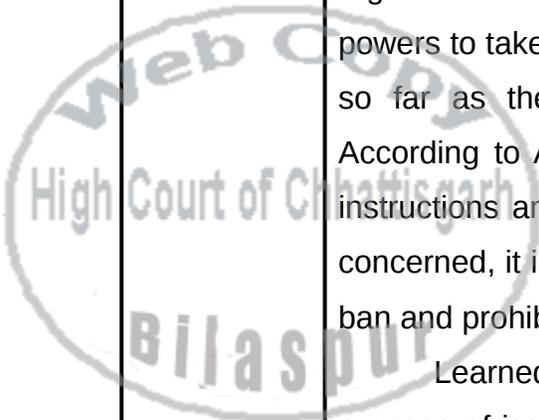
5. AIR 2006 CG1
6. 2009 (15) SCC 570
7. 2015 (9) SCC 209
8. 2016 (7) SCC 353

Opposing the Petition, learned Assistant Solicitor General appearing for Respondent No.1 submits that the two Orders passed by Respondent No.1 have been issued in the year 2019 and that they are already in force for a period of more than two years now and therefore there is no necessity for the staying of the effect and operation of the two Orders at this stage and the matter itself can be finally decided instead of deciding the interim application at this juncture.

It was the further contention of learned Assistant Solicitor General that the object and intension of the entire Act i.e. the Pharmacy Act, 1948, is to ensure regulations and that too educational regulations. Respondent No.1 has got all the powers to take appropriate decision in the larger interest of the public, particularly so far as the Institutions imparting the Pharmacy courses are concerned. According to Assistant Solicitor General, once when there is a power to issue instructions and regulations so far as the courses of B.Pharm and D.Pharm are concerned, it includes the power of the Agency i.e. Respondent No.1 to impose a ban and prohibition insofar as establishment of new Colleges are concerned.

Learned Assistant Solicitor General further contended that the very purpose of issuance of the two Orders dated 17.7.2019 and 9.9.2019 is to put a check and to bring a curve on the recent mushrooming of the Colleges and Institutions imparting the Pharmacy courses. Learned Assistant Solicitor General harped upon the reasons enshrined in the Order dated 17.7.2019 and submitted that it is only a decision imposing moratorium for a fixed period which shall be reconsidered periodically so far as its conditions are concerned. Therefore, it is not a case where the right of the Petitioners stands curtailed for all times to come, but the Petitioners can wait till the moratorium is lifted for the purpose of consideration of their application.

Contention of learned Solicitor General also is that merely because the Petitioners have applied that by itself would not give the right of a legitimate expectation to the Petitioners nor can the Petitioners claim as a matter of right so far as the grant of sanction and approval for establishment of a College/Institution imparting Pharmacy courses is concerned.





Learned Assistant Solicitor General has also relied upon the following Judgments in respect of his contentions:-

1. 1984 (4) SCC 104
2. 1993 (1) SCC 645
3. 2008 (2) SCC 161
4. AIR 2015 SC 2940
5. 2019 (2) SCC 104
6. 2019 (17) SCC 729
7. 2020 SCC Online SC 296

Referring to the aforesaid decisions of the Apex Court, learned Assistant Solicitor General contended that the establishment of an educational institution is not to be treated as a trade or business and therefore it cannot be brought within the ambit of the fundamental right guaranteed under Article 19(1)(g) of the Constitution of India.

Having heard the contentions put forth on either side and on perusal of the records, what is evident from the pleadings and which is not rebutted and disputed by learned Counsel appearing for the Respondents is that the Petitioners' establishment, which is otherwise also having educational institutions imparting various courses, has thought of establishing another institution whereby the studies of the Pharmacy courses could be imparted. The Petitioners have invested huge amount of money for the purpose of putting up requisite infrastructure and the entire planning and other requirements for the purpose of imparting the Pharmacy courses have already been accomplished by the Petitioners, as would be reflected from the pleadings enclosed along with the Writ Petition. Subsequently, the Petitioners, for grant of necessary furnishings in order to start the Pharmacy courses, seem to have applied to the State Government for the requisite NOC so that the NOC could be forwarded to Respondent No.1 for consideration of their Application for approval and sanction to open the Pharmacy College.

The State Government also has granted the NOC to the Petitioners and thereafter the Petitioners' establishment approached the Respondent No.2-University for grant of affiliation. The Respondent No.2-University in turn initially ordered to get the Petitioners establishment inspected for the purpose of considering the requisite affiliation. However, the Respondent No.2 meanwhile vide Order dated 10.8.2021 communicated the Petitioners that on account of the



two impugned Orders passed by Respondent No.1 whereby there is a total moratorium/ban imposed by Respondent No.1 so far as the opening of the new Colleges and Institutions imparting Pharmacy courses is concerned and therefore the application for affiliation was declined to be processed as of now by the Respondent No.2, which has led to the filing of the present Writ Petition.

From the plain reading of the two impugned Orders, it apparently shows that initially when the first Order was passed on 17.7.2019, the North Eastern region of the Country was excluded from the applicability of the moratorium/ban. However, when the second Order was passed on 9.9.2019 there have been many exceptions that have been carved out and the first Order was diluted to a great extent.

For proper understanding of the difference between the two Orders, it would be relevant to take note of the contents of the Resolution passed on the two dates:-

Order dated 17.9.2019 (Annexure P-3)

“RESOLUTION”

“Taking into consideration the availability of sufficient qualified pharmacist workforce, the House unanimously resolved to put a moratorium on the opening of new pharmacy colleges for running Diploma as well as Degree course in pharmacy for a period of five years beginning from the academic year 2020-21. This moratorium shall not be applicable in the North Eastern region of the country where there is a shortage of pharmacy colleges.”

Order dated 09.09.2019 (Annexure P-4)

“RESOLUTION”

“It was unanimously decided that moratorium on the opening of new pharmacy colleges for running Diploma and Degree course in pharmacy for a period of five years beginning from the academic year 2020-2021 will be subject to following conditions:-

- a) The moratorium will not apply to the Government institutions.
- b) The moratorium will not apply to the institutions in North Eastern region.
- c) The moratorium will not apply to the States/Union Territories where the number of D.Pharm and B.Pharm institutions (both combined) is less than 50.
- d) The institutions which had applied for opening D.Pharm and/or B.Pharm colleges for 2019-20 academic session either to the PCI or to the AICTE and the proposal was rejected or not inspected due to some reason or the other will be allowed to apply for 2020-21 academic session and this relaxation is given only for one year i.e. for 2020-21 academic session only.



e) Existing approved pharmacy institutions will be allowed to apply for increase in intake capacity as per PCI norms and/or to start additional pharmacy course(s).

Upon reading the two Resolutions, it would now be relevant to take note of the grounds, reasons and purpose which led to the issuance of moratorium. For ready reference, the reasons so mentioned are also reproduced herein below:-

“During the 106th Central Council meeting of the PCI held on 9th & 10th April, 2019, a concern was expressed about the mushrooming of pharmacy colleges in the country. The issue was threadbarely deliberated. It was noted that-

a) There are approximately 1,985 D.Pharm and 1,439 B.Pharm institutes in the country. The annual intake of students in these institutes (both D.Pharm and B.Pharm) is 2,19,279.

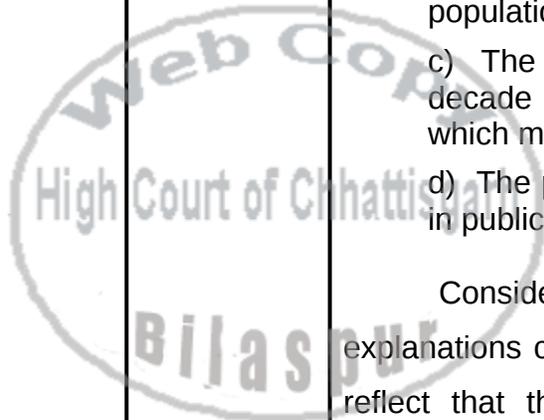
b) This available workforce is enough to meet the current pharmacist-to-population needs of the country.

c) The rapid increase in the number of pharmacy colleges over the last decade may result in shortage of trained and qualified teaching faculty which may affect the quality of education imparted to students.

d) The pass out students are not getting reasonably paid job opportunities in public as well as in private sector.”

Considering the aforesaid objects and reasons, if we look into the explanations carved out vide the Order dated 9.9.2019 (Annexure P-4), it would reflect that the relaxations granted by it *prima facie* seem to be in self-contradiction to the earlier Order dated 17.7.2019. Further, it also leads to a situation where the existing Colleges are permitted to go in for expansion and increasing in their intake capacity. It will also apply to States with less than 50 institutions imparting B.Pharm and D.Pharm courses. The said would also not be applicable upon Government institutions, in addition to its non-availability in the North Eastern region. To add more, it has also been relaxed in those cases where the institutions had applied for in the previous academic session and even in those cases where their applications have either been rejected or were not put in for inspection, they were allowed for the subsequent academic session.

These relaxations referred to herein above would show that the grounds and objects mentioned in the Order dated 17.7.2019 (Annexure P-3) do not come in the way of Respondent No.1 body in achieving the objects laid down in the first Order dated 17.7.2019.





While considering the interim application, what needs to be considered at this juncture is the necessity of an interim order. It is not in dispute that in order to start an Institution, there are series of activities which have to be planned and executed before finally going in for the admissions of the students. The planning and execution of the work starts from the stage of the construction of the building and the laying of the infrastructure required for imparting of necessary course which in the instant case is the course of Pharmacy, both the Diploma course as also the Degree course.

As regards the initial part of the requirements, the Petitioners have stated that they have completed the requisite infrastructure facilities in terms of the requirements under the guidelines laid down by the Pharmacy Council of India. All the requisite building and other requirements in terms of the syllabus for both the courses and also the required laboratory facilities etc., have also been completed.

Now coming to the next stage of granting of requisite permission and affiliation from the concerned Authorities and Agencies including the concerned University and also the Pharmacy Council of India, what also needs to be appreciated is that when the Petitioners had approached the Respondent No.1 Council, it was for the academic session 2021-22 which by efflux of time has already lost its efficacy as the substantial period of time for the said academic session is already over.

Prayer of the Petitioners at this juncture is to consider their claim for the next academic session i.e. 2022-23. Contention of the Petitioners is that unless the formalities are completed in advance as regards the inspection of the establishment to check the requisite infrastructure facilities made available by the Petitioners' establishment for imparting of the aforesaid Courses and subject to pointing out any deficiencies if any, the Petitioners rectifying the deficiencies and shortcomings, the Petitioners at a later stage can be considered for grant of affiliation and permission for running the Institutions for the aforesaid two Courses forthwith.



According to the Petitioners, if the said inspection and other formalities are not completed in advance, then at a later stage if at all if the Respondent No.1 withdraws the moratorium, then the process of inspection and other formalities thereafter would take some time and it would again result in the Petitioners' losing another substantial portion of the next academic session as well. Thus, it would be in the larger interest of the Institutions and it is for these reasons that the Petitioners have prayed for an interim relief as of now permitting them to fill up the requisite forms to be submitted before the Respondent No.1 by opening the portal and the forms in turn may be scrutinised by Respondent No.1 and necessary formalities as regards the required process fee and other pre-deposits like payment of statutory fees etc., be accepted and to submit a feasibility report so that immediately after the withdrawal of the moratorium or the allowing of the Writ Petition, whichever is earlier, the further proceeding for grant of affiliation and permission for starting the Courses can be expedited.

It is relevant at this juncture to mention here that recently before the High Court of Karnataka the Orders dated 17.7.2019 and 9.9.2019 of the Pharmacy Council of India were subjected to challenge in W.P. No.52868/2019 and other connected matters. The High Court of Karnataka allowed the said Writ Petitions holding the two Orders (which have been challenged in the present Writ Petition also) to be bad in law and are therefore invalid.

The Karnataka High Court's Order dated 19.11.2020 was subjected to challenge before the Division Bench of the Karnataka High Court in W.A. No.746/2020 which also finally stood dismissed on 9.11.2021 affirming the Order of the learned Single Bench.

Thus, as on date, there is a positive decision from a Court of law on identical set of facts passed by the Karnataka High Court which has also been subjected to test in an appeal before the Division Bench which too has affirmed the view of the learned Single Bench.

The Pharmacy Council of India thereafter has preferred the SLP which came up for hearing before the Hon'ble Supreme Court on 6.12.2021. However, no interim relief has been granted by the Apex Court in the said case till now.



Given the said facts and taking into consideration the two Judgments of the Karnataka High Court, *prima facie*, this Court is of the opinion that the Petitioners would be entitled for some interim protection.

Accordingly, purely as an interim measure, it is directed that the Respondents shall permit the Petitioners to submit their application required for the necessary permission and approval and also for grant of necessary affiliation for the academic session 2022-23.

The Respondents shall allow the Petitioners to submit their application either by opening the portal and accepting the application or, in the alternative, receiving the application by any other mode permissible.

The Respondents are further directed to process the application and conclude the requisite formalities of inspection etc., except for the granting of permission and approval for going in for the admissions.

It goes without saying that the Petitioners would also liable to pay all the requisite fees and other charges required for the completion of necessary inspection and other requisite formalities etc.

So far as the final order of approval and permission as is required in terms of the Pharmacy Act is concerned, the same shall be undertaken after the final outcome of the present Writ Petition or the withdrawal of the Orders by the Pharmacy Council of India, whichever is earlier.

I.A. No.1, application for grant of interim relief, accordingly stands allowed.

List the Writ Petition for final hearing after four weeks.

Sd/-
(P. Sam Koshy)
JUDGE