
(2015) 07 CHH CK 0039
In the Chhattisgarh High Court
Case No : WPC No. 1202 of 2013

Ajay Singh Rajput and Others	Vs	APPELLANT
State of C.G. and Others		RESPONDENT

Date of Decision : 07-07-2015

Acts Referred:

Constitution of India, 1950 — Article 52
Evidence Act, 1872 — Section 4
Pharmacy Act, 1948 — Section 10, 19, 19(a), 20, 21

Citation : AIR 2015 Chh 157

Hon'ble Judges : Pritinker Diwaker, J.

Bench : Single Bench

Advocate : Raghvendra Pradhan, for the Appellant; Rahul Tamaskar, P.L. Vaibhav Goverdhan and Y.C. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Pritinker Diwaker, J.—Challenge in this petition is to the order dated 23-7-2013 (Annexure P-1) passed by respondent No. 1 allowing the application filed by the private respondents under Section 24 of the Pharmacy Act, 1948 (for short the "Act of 1948") calling in question the election of the members of the Chhattisgarh State Pharmacy Council where the petitioners herein were also elected as such. Facts of the case in brief are that as per Section 19 of the Act of 1948 in every State there would be a pharmacy council consisting of six members, elected from amongst themselves by registered pharmacists of the State. Vide order dated 16-2-2012 passed by the State Government one Dr. R.R. Sahni, Joint Director, Health Services was appointed as returning officer for conducting election of 6 members of Chhattisgarh State Pharmacy Council as provided under Section 19(a) of the Act of 1948. On 4-5-2012 vide Annexure P-2 a notification for election was issued giving the complete election programme and pursuant thereto election was held on 18-6-2012 followed by counting being done on 20-6-2012. After counting, all the petitioners were declared elected as members of the State Pharmacy Council. In the meanwhile, notification dated

4-5-2012 was challenged by respondents 4 and 6 herein in Writ Petition No. 1107/2012. However, as during pendency of the said writ petition the election had already taken place, the petition was withdrawn with liberty to file an application before the State Government under Section 24 of the Act of 1948 challenging the election of the petitioners. Before the State Government three elections petitions were filed -- first by respondents 4 and 6 namely Manohar Kumar Jethani and Kesharmal Agrawal; second by respondent No. 5 namely Vasudev Jotwani and the third by respondent No. 7 namely Kamal Chandrakar. In their election petitions various ground were taken by the respondents including that of violation of Rule 20 of the Pharmacy (MP/CG) Rules, 1978. According to the private respondents, the returning officer had issued the notification on 4-5-2012 whereas term of the outgoing body was to expire on 5-6-2012 and therefore as per the requirement of the Rules the notification was not issued 60 days prior to expiry of term of the outgoing body but it was issued just 30 days prior to the said term.

2. After hearing the preliminary arguments of the private respondents, vide order dated 23-7-2012 the respondent No. 1 has declared the election of the petitioners as null and void solely on the ground that there was non compliance of the mandatory provisions of Rule 20(i) of the Rules and that the notification was not issued 60 days prior to the expiry of term of the outgoing body and it is this order which is under challenge in this petition.

3. Counsel for the petitioners submits as under:--

(i) that the provisions of Rule 20(1) of the Rules, 1978 are not mandatory and are merely directory in nature and therefore, noncompliance of the said rule will not vitiate the entire election;

(ii) that even if the notification has not been issued prior to the stipulated period of 60 days, it will not vitiate the election as no prejudice has been caused to anyone and ultimately, the election has been successfully conducted by the Returning Officer;

(iii) that the notification has been issued by the Returning Officer, who was not within the control of the members of the Pharmacy Council and present is not a case where any allegation has been made against the Returning Officer for not issuing the notification prior to the stipulated period of 60 days;

(iv) though in the impugned order name of respondent No. 8 Parvez Ahmad Siddiqui has also been shown as if he has filed the election petition, but the fact remains that no election petition was filed by him under Section 24 of the Act;

(v) that out of remaining four respondents who had filed election petitions under Section 24 of the Act, three had contested the election and in their election petition they have nowhere pleaded as to what prejudice has been caused to them for non-issuance of the notification by the Returning Officer prior to 60 days of expiry of term of the outgoing body.

(vi) that once these respondents have participated in the election knowing full well that the notification was not issued prior to the stipulated period of 60 days, they are now estopped from challenging the election on this ground as principle of estoppel and acquiescence operates against them.

(vii) though vide impugned order respondent No. 1 has set aside election and directed for conduction of new election as per the rules, but under the rules no such provision is there to conduct fresh election because the term of the outgoing body has already expired and then again the point can be raised by anyone that notification has not been issued prior to 60 days of expiry of term of the outgoing body and therefore, the election cannot take place.

(viii) that the petitioners are elected members of the Council and have been kept away from discharging their duties for the last about two years and thereby not only the right of the petitioners is being infringed but functioning of the Council is also hampered.

4. Counsel for the private respondents submits as under:--

(i) that the order impugned is strictly in accordance with law and since there was utter non compliance of Rule 20(i) there was no need for respondent No. 1 to look into the other points raised in the election petitions;

(ii) that even in the absence of elected members functioning of the Pharmacy Council is proper as the Government officials are taking care of it and unless fresh election is conducted, petitioners cannot be permitted to remain on their posts;

(iii) that the words used in Rule 20(i) are as such which make it clear that the provision is mandatory and the same cannot be termed as directory.

5. Counsel for the respondent State however supports the order impugned.

6. Counsel for respondent No. 2 i.e. State Pharmacy Council while supporting the contention of the counsel for the petitioners submits that the order impugned is a non speaking order and the same has been passed without considering the legal implications involved in the case. He submits that very purpose of forming the State Pharmacy Council is to facilitate its proper functioning and to regulate the rules and norms framed by it in addition to ensuring that pharmacists should run their business within the four corners of law. According to the counsel for respondent No. 2, various complaints are being received by the State Pharmacy Council regarding running of pharmacy shops dehors the rules and in an illegal manner but no action has been taken against them. According to him, before election marathon formalities were completed by the State Pharmacy Council for preparation of voter list after considering all the aspects of the case and after great difficulty the elections could take place and that once by sticking to the democratic pattern the petitioners have been elected, they should be allowed to complete their term of five years.

7. Heard counsel for the parties and perused the documents on record.

8. Before dealing with the pros and cons of the factual and legal aspect of the matter, this Court feels it apposite to take note of the relevant provisions i.e. "The Pharmacy Act, 1948" which are as under:--

19. Constitution and Composition of State Councils:--

Except where a Joint State Council is constituted in accordance with an agreement made under Section 20, the State Government shall constitute a State Council consisting of the following members, namely:--

(a) six members, elected from amongst themselves by registered pharmacists of the State;

(b) five members, of whom at least [three] shall be persons possessing a prescribed degree or diploma in pharmacy or pharmaceutical chemistry or registered pharmacists] nominated by the State Government;

(c) one member elected from amongst themselves by the members of each Medical Council or the Council of Medical Registration of the State, as the case may be;

(d) the chief administrative medical officer of the State ex officio or if he is unable to attend any meeting, a person authorized by him in writing to do so;

[(dd) the officer-in-charge of drugs control organization of the State under the [Drugs and Cosmetics Act, 1940 (23 of 1940)], ex officio or if he is unable to attend any meeting, a person authorized by him in writing to do so;]

(e) the Government Analyst under the [Drugs and Cosmetics Act, 1940 (23 of 1940)], ex officio, or where there is more than one, such one as the State Government may appoint in this behalf:

Provided that where an agreement is made under clause (b) of sub-section (1) of section 20, the agreement may provide that the State Council to serve the needs of the other participating States also shall be augmented by not more than two members, of whom at least one shall at all times be a person possessing a prescribed degree or diploma in pharmacy or pharmaceutical chemistry or a [registered pharmacist], nominated by the Government of each of the said other participating States, and where the agreement so provides, the composition of the State Council shall be deemed to be augmented accordingly.

24. Mode of elections:--

Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election, it shall be referred to the State Government whose decision shall be final.

25. Term of office and casual vacancies:-- (1) Subject to the provisions of this section, a nominated or elected member, other than nominated President, shall

hold office for a term of five years from the date of his nomination or election or until his successor has been duly nominated or elected, whichever is longer.

(2). A nominated or elected member may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall thereupon become vacant.

(3) A nominated or elected member shall be deemed to have vacated his seat if he is absent without excuse sufficient in the opinion of the State Council from three consecutive meetings of the State Council, or if he is elected under clause (a) or (c) of Section 19 or 21, if he ceases to be a registered pharmacist or causes to be a member of the Medical Council or Council of Medical Registration of the State, as the case may be.

(4) A casual vacancy in the State Council shall be filled by fresh nomination or election, as the case may be, and the person nominated or elected to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was nominated or elected.

(5) No act done by the State Council shall be called in question on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the State Council.

(6) Members of the State Council shall be eligible for re-nomination or re-election.

26. Staff, remuneration and allowances:--

The State Council may, with the previous sanction of the State Government,--

(a) appoint a Registrar who shall also act as Secretary and, if so decided by the State Council, Treasurer, of the State Council;

(b) appoint such other officers and servants as may be required to enable the State Council to carry out its functions under this Act;

(c) fix the salaries and allowances and other conditions of service of the Secretary and other officers and servants of the State Council;

(d) fix the rates of allowances payable to members of the State Council:

Provided that for the first four years from the first constitution of the State Council, the Registrar shall be a person appointed by the State Government, who shall hold office during the pleasure of the State Government."

9. Likewise, relevant portion of MP/CG State Pharmacy Council Rules, 1978 being necessary to be referred to is reproduced as hereunder:

"19. The Registrar shall prepare the electoral rolls for the purposes of the elections of members under clause (a) of section 19.

20. (i) The Returning Officer shall, in the case of the first election at any time, and in the case of any subsequent election not less than sixty days before the

day on which the term of office of the State Council or the members elected under clauses (a) of section 19 will expire, and as soon as conveniently may be, but not later than two month; after the occurrence of any casual vacancy, by a notification in the Gazette in Form II, call upon the electors to elect a member of members under clause (a) of Section 19 and appoint:

(a) a date not later than the fifteenth day from the date of publication of the notification as the last date of the nomination of candidates;

(b) a date not later than the third day from the date fixed for nomination, as the date for scrutiny of nominations;

(c) a further date, not later than forty two days from the date fixed for scrutiny, on which poll is taken, shall be closed, and a further date for the counting of votes and time and place at which counting shall take place.

21. Copies of the notification under sub-rule (1) shall be affixed in some conspicuous place in the State Council and published in two or more newspapers printed and published in the State."

10. It is not disputed that the electoral roll was prepared by the Registrar for conducting elections of six members of the State Pharmacy Council. It is also not disputed that after appointment of the Returning Officer the notification was issued on 4-5-2012 i.e. about 30 days prior to expiry of the outgoing body whose term was expiring on 5-6-2012. It is an admitted position that as per Rule 20(i) the notification should have been issued 60 days prior to the expiry of the term of the outgoing body. Thus in the facts and circumstances of the case the following questions are required to be answered by this Court while deciding the issue involved in the present case:

(i) whether non compliance of Rule 20(i) would vitiate the entire election and or for such non compliance the entire election can be declared as null and void?

(ii) whether in the facts and circumstances of the case and keeping in view the object for which the Rules were framed, it can be said that Rule 20(i) is mandatory or directory in nature and its non compliance would in fact result in failure of justice or cause any serious prejudice to the private respondents?

11. A bare reading of Rule 20(i) of the Rules reveals that the object of framing the said Rules is to ensure that during the term of the outgoing body process for fresh election has to be completed and as soon as the term of the outgoing body expires, a new body should take its place without any further delay so that the democratic system may continue and the elected members may work in the larger public interest.

12. From the facts it is apparent that the Returning Officer was appointed on 16-2-2012 but in issuing notification there was some delay on his part and instead of issuing notification 60 days prior to the expiry of the term of the outgoing body, he issued notification on 4-5-2012 i.e. just 30 days prior to the

expiry of the term of the outgoing body. In their application filed before the State Government under Section 24 of the Act of 1948, copies of which have also been shown to the Court, it is nowhere pleaded by the private respondents as to what prejudice has been caused to them in not issuing notification 60 days prior to the expiry of the term of the outgoing body. Though several other grounds have also been taken by the private respondents yet by the impugned order without deciding the said points the entire election has been set aside on the ground of non compliance of Rule 20(i) of the Rules of 1978.

13. Rule 20(i) requires issuance of notification 60 days prior to the last date of holding the office by the outgoing body. Though the language used in this provision shows it to be mandatory yet while interpreting the same even the word "shall" can be construed as "may" making the provision assume the form of "directory" from that of "mandatory". Principles of Statutory Interpretation 12th Edition authored by a legendary jurist -- Hon'ble Justice G.P. Singh, presents a broad canvass while analyzing the provisions being mandatory or directory and this Court selectively and profitably wishes to reproduce the same which is as under:

"The use of word "shall" raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction.

There are numerous cases where the word "shall" has, therefore, been construed as merely directory. "The word "shall", observes Hidayatullah, J., "is ordinary mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands" and points out Subbarao, J., "when a statute uses the word "shall", prima facie it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute." If different provisions are connected with the same word "shall", and if with respect to some of them the intention of the Legislature is clear that the word "shall" in relation to them must be given an obligatory or a directory meaning, it may indicate that with respect to other provisions also, the same construction should be placed. If the word "shall" has been substituted for the word "may" by an amendment, it will be a very strong indication that use of "shall" makes the provision imperative. Similar will be the position when the Bill as introduced used the word "may" and the Parliament substituted the word "shall" in its place while passing the Act. The use of word "may" at one place and "shall" at another place in the same section may strengthen the inference that these words have been used in their primary sense and that "shall" should be construed as mandatory. When the expressions "shall" and "may" are defined in the Act (for example "shall presume" and "may presume" in section 4 of the Evidence Act, 1872) the expressions have to be given the meaning as defined. The words "shall and may" are construed imperatively. As pointed out by Lord Brougham: "if the words are it "shall and may" be so and so done, by such and

such officer and body then the word "may" is held in all soundness of construction to confer, a power but the word "shall" is held to make that power, or the exercise of that power compulsory." Similarly, the words "shall and lawfully may", are in their ordinary import obligatory. The use of the word "shall" with respect to one matter and use of word "may" with respect to another matter in the same section of a statute, will normally lead to the conclusion that the word "shall" imposes an obligation, whereas the word "may" confers a discretionary power. But that by itself is not decisive and the court may having regard to context and consequences come to the conclusion that the part using "shall" is directory."

14. Further, distinction between words "mandatory" and "directory" provisions has been drawn by Hon'ble Justice G.P. Singh in the celebrated book following terms:

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language along most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said : "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. As approved by the Supreme Court: "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. For ascertaining the real intention of the Legislature", points out Subbarao, J., "the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered." If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory. But all this does not mean that the language is to be ignored but only that the prima facie inference of the intention of the Legislature arising from the words used may be displaced by considering the nature of the enactment, its design and the consequences flowing from

alternative constructions. Thus, the use of the words "as nearly as may be" in contrast to the words "at least" will prima facie indicate a directory requirement, negative words a mandatory requirement and "shall" a mandatory requirement.

If a provision is mandatory an act done in breach thereof will be invalid, but if it is directory the act will be valid although the noncompliance may give rise to some other penalty if provided by the statute."

15. The general rule is that non-compliance of the requirement results in nullification of the Act, but there are certain exceptions to the same. If certain requirements or conditions are provided by statute in the interest of particular person, though mandatory, may be waived by him. However, if no public interest is involved, in such a case, the act done will be valid, even if the requirement and conditions have not been complied with. Though issuance of the notice within 60 days is mandatory yet in every case of challenge to the entire election process before the State Government, it would still be open to the State Government/ Election Tribunal or this Court to find out whether in a given case, non-compliance of any part of the rules has in fact resulted in failure of justice or has caused any serious prejudice to any of the parties. General rule is that the mandatory provisions of law require strict compliance and is directory in nature, but even where the provision is mandatory, noncompliance of the same need not necessarily result in nullification of the whole action. In a given situation, even for non fulfillment of mandatory requirement, the authority empowered to take a decision may refuse to nullify the action on the ground that no substantial prejudice had been caused to the party affected or any other party, which would have any other substantial interest in the proceedings. It is relevant to mention at this juncture that party complaining non-compliance should plead and prove the substantial prejudice or failure of justice due to non-compliance of mandatory provisions. In the instant case, there is no specific pleading in the election petition as to how the serious prejudice has been caused.

16. For interpreting Rule 20(i) a guidance can also be drawn from the statutory construction by Francis J. McCaffrey, 1953 Edition, Article 52, page 110 where it is stated as under:

"Where a statute regulates the time at or within which an act is to be done by a public officer or body, it is generally construed to be permissive only as to the time, for the reason "that the public interests are not to suffer by the laches of any public officer" (Looney v. Hughes, 26 N.Y., 514). While the Courts are inclined to hold such provisions to be directory only as to time, they will be read as mandatory if the nature of the act to be performed or the phraseology of the statute indicates an intention on the part of the legislature to exact a literal compliance with the requirement of time. The Courts seek to achieve a just result in not ascribing an invalidating effect to the failure of public officers to observe the time provisions of statutes; a contrary rule would operate unfairly in prejudicing the rights of persons who have no control over the conduct of the public officer."

and from the following passage in Statutory Interpretation by Francis Bennion, second Edition, Part I, Section 10 page 34:

"Even where the duty is mandatory, the Court will not now-a-days hold it to be contravened because of a purely formal or technical defect. This may be described as a defect that does not materially impair the remedy intended to be provided by the enactment for the mischief to which it is directed."

17. In the case in hand election notification was issued about 30 days prior to the last date of the outgoing body. Said notification was widely published in newspapers and thereafter various candidates including some of the private respondents participated in the election process without there being any objection raised by them and it is only after declaration of the result when some of them could not be elected in the election, they approached respondent No. 1 saying that notification was not issued 60 days prior to the term of the outgoing body. The private respondents consciously participated in the said election by filing their nomination paper and took a calculated chance to get themselves elected in the same. Merely because they did not find themselves to have emerged successful in the election, they chose to file the election petition. Thus, as the private respondents have taken a calculated chance by contesting the election without protest, the process of election is illegal and only because in the election they were unsuccessful or the result of the same did not favour them, the election petition came to be filed on the ground that the notification was not issued in accordance with the rules, and pointing out lacuna in the election process, which is contrary to the well settled law in this regard.

18. From the applications filed by the private respondents before respondent No. 1 it is apparent that they have nowhere pleaded as to what prejudice has been caused to them if the notification was not issued 60 days prior to the term of the outgoing body and how such non compliance of the relevant provision has materially affected the result of election.

19. It is relevant to note that out of four remaining respondents who had filed election petitions under Section 24 of the Act, three had contested the election and in their election petition they have nowhere pleaded as to what prejudice has been caused to them for non issuance of notification by the returning officer prior to 60 days of expiry of term of the outgoing body. Here the private respondents have participated in the election knowing full well that the notification was not issued within the stipulated period of sixty days and after being declared unsuccessful in the election they have taken a plea of not issuing the notification prior to sixty days of the expiry of term of the outgoing body.

20. Yet another point requiring consideration by this Court is that respondent No. 1 by the impugned order has set aside the election and directed for conducting it afresh as per the rules but under the rule no such provision is there to conduct fresh election because term of the outgoing body has already expired and here again the point can be raised by anyone that the notification has not been issued

prior to sixty days of the expiry of term of the outgoing body and therefore the fresh election cannot take place.

21. In view of the submissions made by the parties and after thoughtful consideration of the documents on record, this Court is of the opinion that for non compliance of Rule 20(1) in its strict form, entire election would not be vitiated and being so it cannot be declared as null and void. It is held that non compliance of the said Rule has not resulted in failure of justice or caused any serious prejudice to the private respondents.

22. This Court finds sufficient force in the argument of the counsel for the petitioners that the petitioners are elected members of the council and have been kept away from discharging their duties for last about 2 years and thereby not only the right of the petitioners is being infringed but entire functioning of the council is also being hampered.

23. As has been pointed out on behalf of the pharmacy council that in number of matters decision could not be taken for non availability of elected body and proper functioning of the Pharmacy council.

24. Considering all the aspects of the case the order impugned (Annexure P-1) passed by respondent No. 1 cannot be allowed to stand and accordingly it is set aside. As the order impugned has been passed purely on technical ground, the matter is remitted back to respondent No. 1 to consider and decide the election petition filed by the respondents afresh on its own merit after giving due opportunity to the respective parties. Petition is accordingly allowed.