
(2010) 02 KL CK 0087
In the High Court Of Kerala
Case No : W.A. No. 2651 of 2009

Ajith Kumar K.C.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-02-2010

Acts Referred:

Pharmacy Act, 1948 — Section 19(b), 21, 23, 23(1), 25

Citation : (2011) 4 KLJ 620

Hon'ble Judges : P.R. Raman, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : K.P. Dandapani and A. Rajasimhan, for the Appellant; K. Meera (G.P.), P.B. Sahasranaman, K. Jagadeesh, T.S. Harikumar, S.P. Aravindakshan Pillay (G.P.), N. Santha, Peter Jose Christo, S.A. Anand and Sooraj T. Elenjickal, for the Respondent

Final Decision : Allowed

Judgement

Ramachandran Nair, J.—Writ Appeal is filed against judgment of the learned Single Judge upholding Ext. P3 Notification issued by the Government cancelling the nomination of the appellant to the Kerala State Pharmacy Council u/s 19(b) of the Pharmacy Act, 1948 (hereinafter called "the Act"). We have heard Senior counsel Sri. K.P. Dandapani appearing for the appellant, Government Pleader appearing for the State Government, Sri. P.B. Sahasranaman, counsel appearing for the State Pharmacy Council, Adv. Sri. S.P. Aravindakshan Pillai appearing for respondents 4 to 6 and Adv. Sri. Suraj appearing for respondents 7 to 9. The facts leading to the controversy are the following. The appellant while working as a Pharmacist in the Government Hospital, Thalassery was nominated by the Government as a member of the Kerala State Pharmacy Council, second respondent herein, u/s 19(b) of the Act. His nomination was notified vide Ext. P1 on 22.6.2007. Later u/s 23 of the Act, the State Council elected the appellant as its President on 27.7.2007 vide Ext. P2 resolution. On 24.1.2009 the Government proposed to appoint one Mr. M.K. Unnikrishna Panicker as Registrar of the State Pharmacy Council. However, the Council challenged the

Government's proposal for appointment of the said Urmikrishna Panicker by filing W.P. (C) No. 2951/2009 before this Court and this Court vide judgment dated 18.11.2009 cancelled the Government's proposal. During pendency of the Writ Petition i.e. after the court granted stay against the appointment of the said Mr. Unnikrishna Panicker as Registrar of the Council, the State Government vide Ext. P3 dated 29.1.2009 recalled the nomination of the appellant to the Council as Member and simultaneously directed the Drugs Controller who is an Ex-officio Member of the Council, to take over as President of the Council. The appellant challenged Ext. P3 order of the Government before this court by filing W.P. (C) No. 5926/2009 which was dismissed by the learned Single Judge upholding Ext. P3. It is against this judgment of the learned Single Judge the appellant has filed this appeal.

2. The main contention raised by the appellant's counsel is that once a nomination is made by the Government u/s 19(b) of the Act, the member nominated is entitled to continue for a tenure of 5 years in terms of Section 25 of the Act. Therefore, according to the appellant, his removal vide Ext. P3 is illegal and unauthorised by statute. Even though Ext. P3 does not contain any reason for the removal of the appellant from membership of the Pharmacy Council, the State has sought to sustain it by supplementing reasons through a counter affidavit filed in the W.P. (C). The learned Single Judge did not consider the merits of the ground for removal of the appellant, but took the view that the authority of the Government to nominate a person u/s 19(b) takes in, the inherent authority to recall such person at any time. The learned Single Judge has also relied on same court decisions to uphold the stand of the State.

3. Before us, the State canvassed for sustenance of the judgment and the appellant has challenged the findings of the learned Single Judge with reference to various provisions of the Act, particularly Section 23. Besides challenging the recall of appellant's nomination, appellant has also contended that Ext. P3 order issued under Sections 26 and 46 is unauthorised and without jurisdiction. Before proceeding to decide appellant's challenge against his removal, we are constrained to observe that Ext. P3 so far as it relates to Sections 26 and 46 of the Act is unauthorised and untenable because while Section 26 talks about staff remuneration and allowances, Section 46 gives powers to the State to make Rules consistent with the provisions of the Act. The Government Pleader clarified and supported Ext. P3 by stating that failure of the appellant and the Council to appoint the Registrar appointed by the Government is a clear violation of Section 26 of the Act. We do not know how the Government can combine appellant's removal with appointment of the Registrar which is an issue to be separately considered. We have already stated that the State's proposal for appointment of their nominee Mr. Unnikrishna Panicker as Registrar stands quashed by judgment of this court in W.P. (C) No. 2951/2009 which has become final. In our view, irrespective of whether there is violation of Government Order or not by the Council in regard to appointment of the Registrar, the question whether appellant's removal was right or not has to be independently considered with

reference to the relevant provisions of the Act.

4. In our view, Section 25 is absolute in regard to tenure of members, whether nominated or elected to the Council. For easy reference we extract Section 25(1) which is as follows:

S.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.

It is clear from the above that nominated and elected members other than nominated President shall hold office for a term of five years from the date of nomination or election. It is further clear that even after expiry of the five years' tenure, the nominated and elected member will continue until his successor is duly nominated or elected. The very purpose of this provision is to ensure that there is no vacancy of elected and nominated members at any time in the Council. In other words, the Council has to be a permanent body with elected and nominated members. The remaining provisions of course leave freedom to the elected and nominated members to resign from the post. However, there is no provision for withdrawal of a nominated member under the Act. It is to be noted that the State is not given power u/s 46 to prescribe even Rules for withdrawal of nominated members. The position that emerges is that once a member is nominated, he will, by virtue of Section 25, be entitled to hold office for the tenure mentioned therein i.e. 5 years. Fresh nomination, therefore, is possible only on expiry of the tenure of the member already nominated. The only exception to this is the Ex-officio members referred to in Section 21 of the Act, who by virtue of their retirement, resignation, suspension or otherwise removal from office, will cease to be members and the official holding the office as successors will automatically become members of the Council by virtue of their official position.

5. Even though we have held that five years' tenure is guaranteed to the member u/s 25, we are of the view that the Government has authority to remove him and nominate another person provided there is good and valid reason because a nominated member irrespective of his conduct has no vested right to continue for a tenure of 5 years in terms of Section 25 of the Act. Even though Government Pleader canvassed the position that the nominated member holds office during the pleasure of the Government, we do not find any such terminology used in Section 19(b) of the Act. Further, it is pertinent to note that u/s 23, the first constitution of the Council after commencement of the statute is with the President nominated by the Government and he shall hold office during the pleasure of the Government. Therefore, we are of the view that wherever the Legislature has not incorporated the pleasure doctrine, it cannot be brought into Section 19(b).

6. Even though we have found that the State Government cannot recall the

nominee and nominate another person at it's pleasure, we are of the view that the State for good and valid reasons can remove a nominated member based on report of enquiry conducted as provided u/s 45(5) of the Act which is as follows :

S.45. Appointment of Commission of Enquiry.- (5) Whenever it appears to the State Government that the State Council is not complying with any of the provisions of this Act, the State Government may likewise appoint a similar Commission of Enquiry and pass such order or take such action as specified in sub-sections (3) and (4)." It is obvious from the above provision that removal of the Council or any member thereof is possible only when they do not function in accordance with the provisions of the Act or against the scheme of the Act. The position is same so far as a nominated member is concerned and if enquiry is called for any act or omission, it is open to the Government to get an enquiry done as visualised u/s 45 and remove the nominated member to be substituted by another person to be nominated. We are constrained to observe that in this case the reasons stated in the counter affidavit are no longer available to the State to proceed against the appellant because a learned Single Judge has cancelled the Government's nomination of Mr. Unnikrishna Panicker as Registrar, objection to which by Council is stated to be the reason for recalling appellant's nomination to the Council.

Ext. P3 calls for interference on another ground raised by the appellant as well as the Council. The Government after recalling the appellant as it's nominee, has appointed the Drugs Controller as the President. We notice that Government has no authority to appoint President of the Council because Section 23(1) authorises the Council to select President and Vice President and the State has no authority of selection of either of them. We, therefore, allow the Writ Appeal by vacating the judgment of the learned Single Judge and by allowing the Writ Petition by quashing Ext. P3 and declare appellant's entitlement to continue as member nominated by the State u/s 19(b) of the Act and to continue as President so long as he enjoys the support of the Council.