
(2016) 02 GAU CK 0063
In the Gauhati High Court
Case No : Writ Appeal No. 29 of 2016

Prasanna Kumar Sarma

APPELLANT

Vs

The Government of Assam and Others

RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Pharmacy Act, 1948 — Section 26, Section 26 (a), Section 26(a)

Citation : (2016) 2 GauLJ 509 : (2016) 2 GauLR 637 : (2016) 2 GauLT 565 :
(2016) 5 NEJ 408

Hon'ble Judges : Tinlianthang Vaiphei, Actg. C.J. and Manojit Bhuyan, J.

Bench : Division Bench

Advocate : M.K. Choudhury, Sr. Advocate and R. Singha, Advocate, for the Appellant; P. Pathak, Sr. Advocate, S.K. Talukdar and B. Gayal Sarma, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Manojit Bhuyan, J.—1. Heard Mr. M.K. Choudhury, learned senior counsel, representing the Appellant as well as Mr. P. Pathak, learned senior counsel, representing respondent No. 6. Also heard Mr. S.K. Talukdar, learned Standing Counsel for Health Department and Mrs. B. Goyal Sarma, representing the State Respondents.

2. In W.P.(C) No. 114/2015 the Respondent No. 6 herein i.e. Shri Munin Chandra Deka had assailed the Government Order dated 24.12.2014, issued by the Commissioner & Secretary to the Government of Assam, Health and Family Welfare Department, whereby the appellants herein Sri Prasanna Kumar Sarma was entrusted as Registrar of the Assam Pharmacy Council as per provisions under Sections 26(a) of the Pharmacy Act, 1948. In the said Writ Petition Shri Munin Chandra Deka contended that he had retired from service on 31.10.2014 in the capacity of Drug Controller of Assam. However, he was also holding the post of Registrar of Assam Pharmacy Council since the year 2008 and his

registration under the Pharmacy Act, 1948 is valid up to 31.12.2017. According to him, notwithstanding his retirement from service as Drug Controller, he was entitled to continue as the Registrar of Assam Pharmacy Council until 31.12.2017. Grievance raised in the Writ Petition was that by the aforesaid order dated 24.12.2014, the Government of Assam entrusted the Appellant herein as the Registrar of the Assam Pharmacy Council.

3. The primary ground of challenge by Shri M.C. Deka was that such entrustment of the Appellant herein was wholly contrary to the provisions under Section 26(a) of the Pharmacy Act, 1948, in that, although the power of appointment as Registrar vests with the Pharmacy Council, the same has been made directly by the State Government. It was contended that the order under challenge dated 24.12.2014 did not disclose the statutory procedure of having been followed. Additional grounds alleged in the Writ Petition was that the Registrar of Assam pharmacy Council being an important office entrusted with important function, any entrustment de horse the Statute will severely hamper the functioning of the Pharmacy Council.

4. Before the Writ Court the Health Department had produced the relevant records and took the stand that there was nothing unusual with regard to the procedure adopted, inasmuch as, the said procedure had been followed in the past. On behalf of the Health Department it was also contended that the Writ Petitioner Shri Munin Chandra Deka had also been entrusted as the Registrar of Assam Pharmacy Council by following a similar procedure. On the same lines the appellant herein/respondent No. 6 in the writ petition, had contended that Shri Deka having availed the benefit in a similar manner when he was entrusted as the Registrar, it was not open to him to question the entrustment of the appellant herein as being untenable. The Appellant herein had also taken the stand that even if there was some deficiency in the order of entrustment, it was cured by the Resolution No. 5 adopted by the Assam Pharmacy Council in its meeting dated 7.2.2015. Further, the procedure by which the appellant came in as the Registrar is the same procedure that had been consistently followed by the State in the past.

5. The said writ petition i.e. WP(C) 114/2015 was answered vide order dated 18.12.2015 by recording the rival submissions and the pleadings as available in the respective affidavits filed. The records produced by the Health Department were also perused. While reproducing Section 26 of the Pharmacy Act in the judgment and order dated 18.12.2015, the learned Single Judge found that the proviso to Section 26 which empowered the State Government to appoint a person as Registrar was not applicable, inasmuch as, the Assam Pharmacy Council had been constituted more than four years ago. It was held that Clause (a) of Section 26 is the only provision relating to appointment of Registrar by the State Council with the previous sanction of the State Government. In this backdrop, the order dated 24.12.2014 was vested and accordingly answered by holding that the same was not as per procedure laid down in Section 26(a) of the

aforesaid Act. The Resolution No. 5 of the Assam Pharmacy Council dated 7.2.2015, referred to by the counsel representing the Appellant herein was also considered and the learned Single Judge arrived at the finding that the said Resolution had proceeded on the basis that the entrustment of the Appellant as Registrar by the State was by way of an appointment. The said appointment only stood confirmed by the resolution. On such premises, it was held that if such an interpretation is accepted, it would do violence to the clear unambiguous language stipulated under Section 26(a) of the Act. The learned Single Judge also traced as to how the entrustment of the Appellant as Registrar came about. To this end, paragraph 15 of the judgment and order dated 18.12.2015 is reproduced hereunder:

"15. At this stage, the record produced by Mr. Choudhury earned Standing Counsel, Health Department may be perused. Note dated 07.11.2014 as contained in the note-sheet indicates that Smti. Anjali Sarma, wife of respondent No. 6 had made a request to the Hon"ble Chief Minister, Assam by a letter dated 18.10.2014 for appointment of her husband as Registrar of Assam Pharmacy Council. There is an endorsement of Hon"ble Chief Minister on the said application and thereafter the prayer of respondent No. 6 was processed. The record also discloses a note of the Agriculture and Parliamentary Affairs Minister dated 21.10.2014 requesting the Health Minister to release the petitioner from the post of Registrar and to entrust one Sri Sudhir Ch. Saha as Registrar of Assam Pharmacy Council. Prior to that the Agriculture Minister had also requested the Hon"ble Chief Minister on 15.09.2014 with a similar prayer. As noticed above, on the basis of the endorsement of Hon"ble Chief Minister the impugned order came to be issued."

6. The importance of the Registrar of Assam Pharmacy Council was also highlighted in the judgment under appeal to conclude that the Registrar of the Assam Pharmacy Council plays a pivotal role in so far as the Health Sector of the State is concerned. Therefore, it is of utmost importance that the statutory procedure prescribed for appointment of Registrar is scrupulously followed. As regards, the submission that the Writ Petitioner having availed benefits under the same procedure cannot now challenge the appointment of the Appellant, the learned Single Judge held that the statutory procedure for appointment of Registrar cannot be disregarded notwithstanding any deviation made in the past, inasmuch as, two wrongs do not make a right. If a wrong had been committed in the past, the same cannot be allowed to perpetuate. On the findings and discussions above, the order dated 24.12.2014 was set aside and quashed as being contrary to the provisions under Section 26(a) of the Pharmacy Act, 1948. The matter was remanded back to the Assam Pharmacy Council to appoint a Registrar straightly in accordance with law and to notify the procedure to be followed.

7. In the present Writ Appeal, the Appellant herein (Respondent No. 6 in the Writ Petition) have pressed the grounds as taken before the learned Single Judge. In

the same breath, the counsel representing the Appellant also submits that the appellant is not adverse to the direction at paragraph 19 of the judgment under appeal, whereby the matter was remanded back to the Assam Pharmacy Council for making appointment of a Registrar strictly in accordance with law and by notifying the procedure to be followed. The submission made is that the Appellant be allowed to continue as Registrar until such time a Registrar is put in place pursuant to the direction of the learned single Judge.

8. Notwithstanding the aforesaid submission Mr. M.K. Choudhury, learned senior counsel relies upon the decision in *R.N. Gosain v. Yashpal Dhir*, reported in , (1992) 4 SCC 683 to say that law does not permit a person to both approbate and reprobate, in that, a person cannot be allowed to say at one time that a transaction is valid and thereby obtain some advantage and then to turn around and say that it is void for the purpose of securing some other advantage. Learned senior counsel also places reliance in the case of *N. Suresh Nathan and another v. Union of India and others*, reported in , 1992 Supp (1) SCC 584 and *State of Sikkim v. Dorjee Tshering Bhutia and others*, reported in , (1991) 4 SCC 243 for the proposition that the past practice extending over a long period does not require upsetting it. According to Mr. Choudhury, the Assam Pharmacy Council had remained inoperative over a period of time and therefore, the statutory provisions remained unworkable. On this count, the Appellant strives to derive sustenance from the aforesaid case of *State of Sikkim* (supra) to say that the statutory provisions having remained unworkable, as such, the manner of appointment of the Appellant cannot ordinarily be called into question. Lastly, the Appellant places reliance in the case of *Shangrila Food Products Ltd. and another v. Life Insurance Corporation of India and another*, reported in , (1996) 5 SCC 54 to say that the High Court under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice.

9. Mr. P. Pathak, learned senior counsel representing the respondent No. 6/writ petitioner reiterates the submissions made before the learned Single Judge and vehemently argues that no infirmity whatsoever can be attributed to the judgment under appeal. In addition, it is contended that the appeal does not stand for any further consideration, inasmuch as, following the judgment dated 18.12.2015, the appellant has already been removed from the office of the Registrar on 31.12.2015, as would be apparent from the document at Annexure-12 to the Memo of Appeal. Mr. Pathak submits that the appointment/entrustment as Registrar of the Council can only proceed in the manner envisaged by law, that is, by following the procedure under Section 26 (a) of the Pharmacy Act, 1948. Mr. S.K. Talukdar and Mrs. B. Goyal Sarma have, reiterates the stand taken by it before the learned Single Judge.

10. We have heard the parties and placed on record our agreement with the judgment and order dated 18.12.2015 passed in W.P.(C) 114/2015. We also hold that the decisions relied upon by Mr. Choudhury do not come to the aid of the

appellant. Merely on the ground that there has been a past practice extending over a long period justifying the entrustment order dated 24.12.2014 and the statutory rules had remained unworkable in the absence of the Assam Pharmacy Council cannot go to validate and render legal support to the said order dated 24.12.2014. Further, the issue for decision is with regard to the scope, ambit and enforcement of a statutory procedure and has nothing to do with any transaction. A complete and substantial justice can only be affected by re-enforcing the enforcement of the statutory procedure. The manner in which the entrustment order in favour of the appellant came to be issued marks a clear departure from the provisions under Section 26(a) of the Act. Although the proviso to Section 26 empowers the State Government to appoint a Registrar, the said power can only be extended within the first four years from the first constitution of the State Council. The facts herein do not allow applicability of the said proviso. Having said that, a Registrar can only be appointed by the State Council with the previous sanction by the State Government and not vice versa, as was done in the case of the appellant. Without any doubt, the office of the Registrar carries immense responsibility and obligations and the State cannot be allowed to tinker with the appointment by throwing to the winds the statutory procedure as prescribed under Section 26(a) of the Act. The State Council is a creature of the statute with the solemn object of making better provisions for the regulation of the profession and practice of Pharmacy. In the matter of appointment of a Registrar the power of the State Council cannot be superseded. In other words, the power that vests with the State Council under Section 26(a) of the Act in appointing a Registrar cannot be taken away, merely at the instance of the State Government. The resolution No. 5 of the Assam Pharmacy Council dated 7.2.2015 only adds to the irregularity and illegality of the entrustment order dated 24.12.2014. The submission that the respondent No. 6/writ petitioner cannot be allowed to appropriate and reprobate, do not inspire the confidence of the Court. Notwithstanding the deviation made in the past with regard to appointment of Registrar, the past practice cannot be allowed to sustain and/or to perpetuate in view of the clear statutory prescription under Section 26(a) of the Act. The submission of Mr. P. Pathak that the appellant had been removed following the judgment and order of the learned Single Judge on 31.12.2015 is also taken on board.

11. It is too well settled in law that where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. All other methods of performance are necessarily forbidden. Reference can be had to the celebrated case law in *Nazir Ahmad v. King Emperor*, reported in , AIR 1936 Privy Council 253 (2).

12. From the discussions above, the inevitable conclusion is that the Writ Appeal must fail. Accordingly, the appeal stands dismissed and the judgment and order of the learned Single Judge is upheld. No costs.