

(2013) 03 UK CK 0061

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 168 of 2013

Yogendra Singh Tomar

APPELLANT

Vs

Bar Council of Uttarakhand and Others

RESPONDENT

Date of Decision : 25-03-2013

Acts Referred:

Advocates Act, 1961 — Section 15(2)

Citation : (2013) 03 UK CK 0061

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : V.B.S. Negi, assisted by Mr. M.C. Pant and Ms. Razia Begh, for the Appellant; D.S. Patni, Shobhit Saharia, Advocates for Respondent Nos. 1 and 2, Mr. Piyush Garg and Mr. A.K. Sharma Advocates, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—The above writ petition has been filed by the petitioner, above named, challenging the election for the post of Chairman, Bar Council of Uttarakhand. Consequently, declaration of the result, and further constitution of Tribunal. Shorn of all details short fact relevant this matter is as follows:-

The petitioner is a member of Bar Council of Uttarakhand. He contested election for the post of Chairman. On the date of election total 19 voters cast their votes to elect Chairman from and amongst three contestants. It is claimed by the petitioner that he secured six votes of first preference whereas respondent No. 3 has also received six votes of first preference and respondent No. 4 received three votes in the first preference and four votes were declared invalid. If the same are not be treated as invalid then the petitioner would be able to secure two more votes of first preference. According to the petitioner, all the votes which were declared to be invalid by the Returning Officer are valid votes, as the same were cast in accordance with Rule 22 of the Election Rules, 2009 (hereinafter referred to as "First Rule"). If these votes, which were declared invalid, are examined and recounted it would be found that declaration of result

absolutely wrong and the petitioner would have been elected.

2. It is further stated in the writ petition that the Tribunal for resolution of election dispute was not constituted in terms of the Rule 32 sub rule (5) of the First Rule as it was not done on or before the date on which the time of election fixed under Rule 4 of the First Rule. According to the petitioner, if the Tribunal is not constituted in terms of Sub Rule (5) of Rule 32 of the First Rule, there is no Tribunal in real sense. As such there is no alternative remedy and the only remedy is by way of the present writ petition.

3. In the counter affidavit it has been urged that this Tribunal is the only forum for adjudication of this dispute. The methodology for challenging the election of Chairman is provided under Rules 14 and 15 of Rules for Election of Chairman and Vice Chairman framed by Bar Council of Uttarakhand on 18th October, 2008 (hereinafter referred to as "Second Rule"). In this case, admittedly the Tribunal has been constituted comprising of Senior Advocates having requisite experience by valid resolution adopted by respondent No. 1 to which the petitioner is also signatory. Therefore, the petitioner, after having signed the resolution is estopped from challenging legality and validity of formation of the Tribunal. The petitioner is bound to accept the Tribunal as being only adjudicating authority. On merit it has been said that the votes were duly counted, scrutinized as such declaration of invalidity of four votes is absolutely correct and lawful as the markings of those were made in violation of rules. Therefore, after participating in the election and becoming unsuccessful one cannot challenge such result on merit.

4. The learned counsel for the petitioner submits that the Tribunal is not lawfully constituted, as it was constituted after declaration of the result, not on or before the date on which the time of election fixed under Rule 4 of First Rule. The language mentioned in the said Sub-Rule (5) of Rule 32 of the First Rule is mandatory in nature. When the Tribunal is not validly constituted, there is no forum as mentioned in the first and second Rules, which can be termed to be an alternative one. He submits further that if four votes which are declared invalid are examined and scrutinized by this Court, it would be found those are valid one and lawfully cast under relevant Rules. The method of casting vote is to mark figure one either in English or Hindi or Roman against a candidate. These were cast in accordance with the Rules and in spite of that the same were wrongly and motivatedly declared invalid.

5. Learned counsel for the respondent Nos. 1 and 2 submits that the Tribunal is still in existence under the Rules and only personals of the same are supplied from time to time. Admittedly, the personals were supplied by validly adopted resolution to which the petitioner is the signatory. He further submits that the language as regard time factor mentioned in Sub Rule (5) of Rule 32 of the First Rules to constitute Tribunal is directory in nature. Senior members of the Bar have been chosen this time as the members of the Tribunal. On receipt of the complaint made by the petitioner, the same was forwarded by respondent No. 2

to the said Tribunal. Therefore, the petitioner should go to the alternative forum and this Court should not entertain the writ petition.

6. On merit he submits that on oath respondent No. 2, who is ex-officio-Returning Officer, has said that four votes were duly scrutinized and examined and found to be invalid, as the same were cast contrary to the Rules for this purpose. These statements and averments have not been denied and disputed by filing rejoinder affidavit. Therefore, this statement is deemed to have been admitted because of non traversal. On merit too this writ petition deserves to be dismissed.

7. After hearing learned counsel for the parties and after going through the pleadings filed before me, it appears to me that three questions are to be answered to decide the matter. The same are as follows:-

1. Whether there is an alternative remedy, as urged by the learned counsel for the respondents to resolve the dispute canvassed in the writ petition?

2. If so, such alternative remedy is in existence legally.

3. If the two questions are answered in negative whether this Court can decide the matter on the affidavits or not?

8. I think the first two questions are overlapping each other, therefore, it can be discussed and dealt with analogously. Indisputably, under sub-rules (4) and (5) of Rule 32 of the First Rule the mechanism has been provided for resolution of all the disputes arising out of election of the members. The aforesaid provision is setout hereunder:-

32. Disputes as to the validity of elections:

(1) ...

(2) ...

(3) ...

(4) All disputes arising under the above sub rules shall be decided by a tribunal to be known as an Election Tribunal comprising of 3 advocates whose names are on the State Roll and who are not less than 20 years standing and who are not candidates in the said Election to the Bar Council.

(5) The Election Tribunal shall be appointed by the Bar Council on or before the date on which the time of the elections fixed under rule 4. Provide and if any member of the Tribunal so appointed chooses to be a candidate in the said Election he will be replaced any another Advocate nominated by the Advocate General before the date of Election.

(6) ...

The aforesaid Tribunal is competent to decide the dispute with regard to the

election of the members. In this case, election of the Office bearer of Council, namely, Chairman is questioned. It is contended by the learned counsel for the respondents that the aforesaid provision cannot be pressed into operation for the resolution of dispute canvassed in this writ petition, Rules 14 of and 15 of Second Rule are appropriate. Going by the apparent reading it is so what the learned counsel for the respondents says. But on careful reading of Rules 14 and 15 of Second Rule, it will appear that ultimately election of the Chairman and the Vice Chairman can be decided by the Tribunal constituted under Rule 32 of the First Rules. Rule 14 and 15 of the Second Rules provide as follows:-

14. The Election of a Chairman or a Vice-Chairman may be questioned by a member through a Letter addressed to the Secretary within three days of the declaration of the result of the election on such grounds on which the election of a member can be question.

15. The Secretary shall refer the same to the Election tribunal constituted under rule 32 framed u/s 15(2) of the advocates Act and the decision of the Tribunal shall be final.

Therefore, I conclude that the dispute with regard to the election of Chairman and Vice Chairman can be resolved by the Tribunal lawfully formed under Rule 32 (4) and (5) of First Rule. Admittedly factually the Tribunal has been formed choosing three qualified lawyers. It is contended that such Tribunal was not formed at the time when it is required under the Rules, but after declaration of result. The date of formation of the Tribunal is not disputed.

9. Now the question is whether the formation of the Tribunal on the date subsequent to the date mentioned in the Rule is lawfully valid or not. In other words whether the language of Sub Rule (5) of Rule 32 of First Rule is mandatory character or not. If it is a mandatory then obviously the time factor is also mandatory and if it is so constitution of Tribunal is not lawful.

10. Rule of interpretation of Statute is well settled to state that ordinarily the word "shall" is treated to be mandatory. However, the learned counsel for the respondents says that having regard to the object of the said Rules, the aforesaid word "shall" cannot be treated to be mandatory but directory. Therefore, the time fixed for formation of the Tribunal is a flexible one and it can be constituted at a later stage. Moreover, the said resolution adopted for constitution of the Tribunal was also signed by the petitioner. Therefore, he has waived such objection. In my view, this plea of waiver is not acceptable to the Court as no one can waive the provision of the Statute. In other words, the principle of estoppel is not applicable as against the provision of Statute.

11. I, therefore, overrule this objection.

12. The Hon''ble Supreme Court in catena of decisions says that in order to understand the character of the provisions, the Court must have regard to the context, subject matter and object of the statutory provision not upon apparent

language employed in therein.

13. Two of such Supreme Court decisions supplied by the learned counsel for the respondents are as follows:-

1. Mohan Singh and Others Vs. International Airport Authority of India and Others, (see para 17)

2. P.T. Rajan Vs. T.P.M. Sahir and Others, (see para 45)

14. Upon careful reading of sub rule (5) of Rule 32 of First Rule, it appears to me that whole object of the sub rule is to ensure existence of independent and impartial Tribunal to resolve all disputes arising out of election. According to me all disputes mean those arise with regard to filing of nomination by the candidate and participation of election, counting of votes and then result of the election. All these stages constitute election. If such Tribunal is formed after election, then it would be impossible to decide dispute arising out of nomination of papers and participation in election, as once nomination paper is accepted by the officer concerned it can hardly be questioned. On the other hand if the Tribunal is formed at the time as mentioned in the Rule, then it can decide dispute with regard to candidature even before holding election.

15. I, therefore, hold that the context and object of the sub rule (4) of Rule 32 of First Rule demands Tribunal is to be constituted as prescribed and it is mandatory.

16. I, consequently, hold that the Tribunal which has been factually formed has not been constituted in accordance with the provision of law. Therefore, it is no nest in the eye of law, and consequently, the aforesaid forum is not an alternative forum in this matter. However, it would have been open for the petitioner to approach civil court, but existence of alternative remedy by way of a civil court is not a bar. This Court has examined the extent of the dispute and is of the view that it can be resolved by affidavits, no witness action is necessary.

17. It is contended that rejection of four votes is not in accordance with the Rules. It is said that votes have been cast in accordance with the Rules, indicating the mark as against the candidate. In spite of that the Presiding Officer rejected the same overlooking legal provision. This allegation has been denied by the Secretary. However, the Secretary has not affirmed his affidavit in the capacity of Presiding Officer, but on behalf of the Council also. It is not an independent affidavit qua Presiding Officer. In such situation without accepting any one's vision, I think independent and fair material should be collected. Accordingly, I take following measure for the time being.

18. I am told that the said ballot papers are still preserved. Therefore, I appoint Mr. Manoj Tiwari, Senior Advocate a practicing Advocate of this Court, as a Special Officer to examine cancelled four votes and to submit a report to this Court whether this has been validly cancelled under the Rules or not. Such report is to be submitted on 23rd April, 2013.

19. I direct the Presiding Officer to handover all the ballot papers to the Special Officer in a sealed cover and he will open the sealed cover in the presence of the learned lawyers for both the parties, thereafter he will submit the report in a sealed cover in the Office of the Registrar General on 23rd April, 2013. This matter will appear in the list on 29th April, 2013 to see the report, so that appropriate order may be passed.