

JUDGMENT

Homeopathic Doctor MEHMOOD-UL-HAQ ABBASI

Versus

H/Dr. MUHAMMAD IRFAN

I.C.As. Nos. 913, 914 and 915 of 2013, decided on 14th March, 2017.*

JUDGMENT

ATHAR MINALLAH, J.---Through this consolidated judgment we shall decide the instant Intra Court Appeal and Intra Court Appeals Nos.913/2013 and 914/2013.

2. The facts, in brief, are that the notification, dated 18-02-2011, was challenged through filing Writ Petition No.743/2011. The said notification had the effect of restoring Dr. Mehmood-ul-Hassan Abbasi (hereinafter referred to as the "appellant") as a Member of the National Council for Homeopathy (hereinafter referred to as the 'Council'). The appellant was elected as a Member of the Council and then as its President. The term of his office as the President was to expire on 25-09-2011. The Secretary, Ministry of Health, Government of Pakistan in exercise of powers conferred under section 13(2) of the Unani, Ayurvedic and Homeopathic Practitioners Act, 1965 (hereinafter referred to as the Act of 1965) issued show-cause notice, dated 17-06-2009. After affording an opportunity of hearing, a notification, dated 28-07-2009, was published in the official Gazette whereby the appellant was disqualified as Member of the Council under section 13(2) of the Act of 1965. However, vide notification published in the Official Gazette on 18-02-2011, the earlier notification, dated 28-07-2009, was superseded and the appellant was restored as a Member of the Council. As already noted, the term of office for which the appellant was elected as one of the Members of the Council had expired on 25-09-2011. Writ Petition No.743/2011 was filed by the respondent challenging the notification, dated 18-02-2011, and in addition a writ was sought to declare the acts/orders passed in pursuance of the said notification as illegal. The prayers sought in the other two petitions were distinct. The learned Single Judge in Chambers allowed Writ Petition No.743/2011 vide the impugned judgment, dated 24-06-2013, declaring the notification, dated 18-02-2011, as illegal, void ab initio and without legal effect. In paragraph 9 of the impugned judgment, the learned Single Judge in Chambers has observed and held that the effect of disqualification under section 13(2) was that the name of the appellant had also been struck off from the roll and, therefore, removal of his name from the register maintained under section 28 of the Act of 1965 had become a mere ministerial act. However, the two constitutional petitions wherein distinct prayers had been sought were dismissed on the sole ground that since Writ Petition No.743/2011 had been accepted, therefore, the grievances of the petitioners stood redressed.

3. The learned counsel appearing on behalf of the appellant have contended that; the

tenure of the petitioner as a Member of the Council had expired on 25-09-2011 and, therefore, Writ Petition No.743/2011 had become infructuous; the provisions of section 13(2) and section 28 are distinct and separate; the notification, dated 28-07-2009, was to the extent of disqualification of the appellant as a Member/President of the Council and had no concern whatsoever with the removal of his name from the register under section 28 of the Act of 1965; the object, purpose and intent of the proceedings under section 13(2) and section 28 are distinct and separate; the learned Single Judge in Chambers has misconstrued the provisions of the Act of 1965 by holding that the removal of the name from the register under section 28 has become a ministerial act; it is settled law that an authority vested with powers is also vested with jurisdiction to recall the same and, therefore, the notification, dated 18-02-2011, had been issued in accordance with law; fresh elections were held on 12-03-2012 and, therefore, the proceedings under section 13(2) leading to issuance of the notification, dated 28-07-2009, had become irrelevant and thus a closed and past transaction.

4. The learned counsel appearing on behalf of the respondents have argued that; the disqualification under section 13(2) was on the basis of misconduct, leading to the removal of the name of the appellant from the register under section 28 of the Act of 1965; the appellant was proceeded against and a show cause notice was issued; an inquiry was held and thereafter he was found guilty; he was declared to be disqualified as Member/President; the disqualification is of a permanent nature; the provisions of the Act of 1965 do not provide for the power of review and, therefore, the notification, dated 18-02-2011, had been issued without lawful authority and jurisdiction; once a person has been disqualified as a Member of the Council then it becomes mandatory that his name is removed from the register under section 28 of the Act of 1965.

5. The learned counsel have been heard and the record perused with their able assistance.

6. The appellant was elected as a Member of the Council and thereafter as its President for a fixed term which had expired on 25-09-2011. During this term, a show-cause notice, dated 17-06-2009, was issued. An inquiry was held and after affording an opportunity of hearing, the appellant was disqualified from being a Member/President vide notification, dated 28-07-2009. Subsequently notification, dated 18-02-2011, was issued in supersession of the earlier notification, and thus the appellant was restored as Member of the Council. The next elections were held in March, 2012 and the appellant was once again re-elected as Member vide notification dated 20-03-2012. The appellant was later elected as President vide notification dated 18-07-2012. Admittedly, the notification, dated 28-07-2009, was issued during the term of office, which had expired on 25-09-2011. Moreover, it is also an admitted position that the show-cause notice and pursuant thereto notification, dated 28-07-2009, were issued under section 13(2) of the Act of 1965.

7. The questions which emerge for our consideration are; firstly, whether the Federal Government was vested with the power to review the notification, dated 28-07-2009; secondly,

whether the proceedings under section 13(2) and section 28 are distinct, and if that is the case then the consequences and effect of the notification dated 28-07-2009 qua section 28 of the Act of 1965. In other words, whether the learned Single Judge in Chambers has correctly interpreted the provisions of the Act of 1965 by holding that the issuance of a notification under section 13(2) renders the removal of the name from the register under section 28 as a ministerial act.

8. In order to answer the above questions it would be beneficial to examine the relevant provisions of the Act of 1965. The Act of 1965 has been enacted with the object and purpose to regulate the qualifications and to provide for the registration of practitioners of Unani, Ayurvedic and Homeopathic Systems of Medicine. The declared purpose stated in the preamble of the Act of 1965 is to promote and popularize the said branch of medicine and to regulate education and research in, and to provide for the registration of practitioners relating to the said categories of medicine. The 'Council' is defined in clause (bb) of section 2 as meaning the National Council for Tib or, as the case may be, the National Council for Homeopathy established under section 3. 'Misconduct' is defined in clause (cccc) as meaning 'conduct contrary to the provisions of the Act of 1965, the rules and regulations made there under and the Code of Ethics adopted by the Council. The expression 'recognized', 'register' and 'registered practitioner' are defined in clauses (f), (g) and (h) of section 2. The expression 'approval' is defined in clause (a) of section 2 as meaning 'approved by the Federal Government on the recommendation of the Council'. The Council has been declared as a body corporate having perpetual succession and common seal. Section 4 describes the composition of the Council for Tib while section 5 of the National Council for Homeopathy. Section 6 provides that the President and Vice-President shall be elected by the Members of the Council from amongst themselves. Section 7 provides that elections under the Act of 1965 are required to be held at such time and in such manner as may be prescribed by the rules. The names of the Members, the President and Vice-President are notified in the official Gazette by the Federal Government. The term of office of the Members is provided under section 9 and subsection (3) thereof declares the Members to be eligible for re-nomination or re-election after the expiry of the prescribed term. Subsection (1) of section 13 provides for the grounds of disqualification of Members while subsection (2) empowers the Federal Government to disqualify a person from the Membership of the Council or a Committee or the examining body, as the case may be. The functions of the Council are enumerated in section 14. Chapter 3 of Part II of the Act of 1965 i.e. sections 23 to 29 provide for the procedure and powers vested in various authorities for the purposes of the registration of practitioners and removal of names from the register or cancellation or alteration of entries' therein. Section 23 prescribes the procedure for applying to the Council for the registration of practitioners. The eligibility criterion and conditions for the purposes of being registered under the Act of 1965 are provided under section 24. Section 28 describes the grounds and procedure for removal of the name of a practitioner from the register. It provides that the Council in its discretion may direct that the name of any

practitioner be removed from the register or the list. There are two eventualities contemplated for removal of the name i.e. either the practitioner has been convicted of a cognizable offence or has been found guilty of misconduct after due enquiry. In case one of the eventualities exists then the Council has to form an opinion as to whether the offence or misconduct discloses moral turpitude, which would render the registered person unfit to practice his or her profession. The proviso to section 28 makes it mandatory to give the person against whom proceedings have been initiated a reasonable opportunity to show cause before taking action. Section 29 empowers the Council to cancel or alter entries in the register after due inquiry and giving an opportunity of hearing to the person concerned, enabling it to form an opinion that the entry was made fraudulently or improperly. The powers of the Registrar are described in Chapter 4 of the Act of 1965.

9. The Federal Government, in exercise of powers conferred under section 46 of the Act of 1965 and after consulting the Council in this regard, has made the Unani, Ayurvedic and Homeopathic System of Medicine Rules, 1980 (hereinafter referred to as the 'Rules of 1980'). The said Rules have prescribed the term of office of a Member of the Council in Rule 15 as five years. The procedure for election is also prescribed in the Rules of 1980. Likewise the Federal Government, in consultation with the Council, has also made the National Council for Homeopathy Administration and Financial Management) Rules, 2008.

10. A combined reading of the provisions of the Act of 1965 as a whole, particularly those discussed above, clearly shows that the legislature had intended to establish the Council as a regulatory authority with the object of regulating such systems of medicine which are described *ibid*. The Act of 1965 is a comprehensive, self contained statute dealing with all matters relating to the regulation of the subjects covered there under. The composition of the Council is provided in Part-II, Chapter 1 of the Act of 1965 and describes the conditions of eligibility for, and the manner of appointing a Member of the Council either through nominations or elections, as the case may. The grounds on which a Member is exposed to disqualification are provided under subsection (1) of section 13. Subsection (2) of section 13 empowers the Federal Government to disqualify a person from the Membership of the Council or from a Committee or examining body. The powers vested in the Federal Government under subsection (2) of section 13 are explicitly in respect of disqualification of a Member of the Council and not removal of the name of a practitioner registered under the Act of 1965. A member is either nominated or elected, as the case may be, for a fixed term of five years as prescribed under Rule 15 of the Rules of 1980. It is further noted that the grounds of disqualification of a Member to be nominated or elected to the Council and enumerated in clauses (a) to (d) of subsection (1) of section 13, does not envisage that if a person who has been disqualified and removed as a Member during a fixed term would be barred from being nominated or to contest elections subsequently. The grounds for disqualification under subsection (1) of section 13, *inter alia*, includes in section 13 (1)(d) removal of name from the register. A person who has been disqualified under subsection (2) of section 13 as a Member

of the Council would be eligible for re-election or re-nomination since there is no bar in this regard. The crucial question for adjudication of the appeals before us is, whether an order of removal passed by the Federal Government in exercise of powers conferred under section 13(2) would ipso facto lead to the consequences provided under section 28 of the Act of 1965. Is the consequence provided under section 28 a ministerial act if an order is passed under section 13(2)?

11. Chapter 13 of the Act of 1965 deals with the registration of practitioners and section 28 provides for the grounds and procedure for removing the name after it has been entered in the register. A plain reading of section 13 and section 28 unambiguously shows that they are distinct and separate. A person who has been disqualified from the Membership of the Council under subsection (2) of section 13 does not automatically become liable for the purposes of removal of his or her name from the register unless the pre-conditions prescribed under section 28 have been fulfilled. The Federal Government is empowered under section 13(2) to disqualify a person from membership while the powers under section 28 vest in the Council. The registration under sections 23 and 24 is not that of a Member but rather of a practitioner. While proceeding under section 28 proceedings have to be conducted independent of an order passed under section 13(2) of the Act of 1965. The Council has to form an opinion after conducting an enquiry regarding the alleged misconduct of the registered practitioner, and that too after given a reasonable opportunity to the person who is proceeded against. The proceedings under and object of section 23(2) is altogether different.

12. From the above discussion it is obvious that the disqualification under section 13(2) would not render the proceedings under section 28 as being ministerial in nature. We are afraid that the learned Single Judge in Chambers has misconstrued the provisions of section 28 by observing and holding that the consequence of disqualification under section 13(2) would be removal of a practitioner from the register under section 28 the Act of 1965.

13. The learned counsel for the respondents have rightly argued that the power of appeal or review can only be exercised if the same have been conferred or provided under the relevant statute. Review or appeal are statutory rights and unless provided under the relevant statute the same would not be available. There is no cavil to the proposition that if a statute does not provide for a right of review or an appeal then any order or proceedings of such a nature would be ultra vires and void. The Act of 1965 definitely does not provide the right of review or revision against an order passed under section 13(2) of the Act of 1965. In the instant case the Federal Government was, therefore, not vested with the power and jurisdiction to review or recall the notification, dated 28-07-2009, by issuing notification dated 18-02-2011. However, the notification dated 28-07-2009 had become infructuous after the term of the appellant had expired. Moreover, the notification dated 28-07-2009 did not create a bar for the appellant to contest elections after the expiry of his term. Indeed the appellant would have been disqualified if pursuant to independent proceedings under section 28 of the Act of 1965, the name of the

appellant had been removed from the register. Admittedly, this is not the case in the present appeal.

14. Admittedly no proceedings have been initiated under section 28 of the Act of 1965. The proceedings leading to the notification, dated 28-07-2009, were in relation to the Membership of the appellant during the five year term, which had expired on 25-09-2011. The learned counsel appearing on behalf of the appellant are correct in arguing that after the term of five years had expired on 25-09-2011, the notification, dated 28-07-2009, had lost its validity and consequently the constitutional petition had also become infructuous. The Membership of the appellant for the succeeding term pursuant to elections held in April 2012 was, therefore, unaffected by the notification, dated 28-07-2009. It is further noted that the connected Intra Court Appeals arise out of separate judgments passed in the respective Writ Petitions wherein the prayers were distinct and separate. However, the learned Single Judge in Chambers allowed the petitions on the sole ground that the notification dated 18-02-2011 had been set aside on account of allowing Writ Petition No.743/2011. We have already held that even if the notification, dated 18-02-2011, is excluded from consideration yet the notification, dated 28-07-2009, had lost its validity after the term of the appellant as a Member had expired on 25-09-2011 nor could it have affected the elections held in March, 2012 for another term of five years.

15. For what has been discussed above, the instant appeals are allowed and the impugned judgments are hereby set aside. However, Writ Petitions Numbers 2866/2012 and 2617/2012 shall be deemed to be pending and shall be decided after affording an opportunity of hearing to the parties.

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