

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
23.

Date of decision: 8th February, 2011

+ **W.P.(C) 4670/2010**

ASHISH MIDDHA Petitioner
Through: Petitioner in person.
versus

INSTITUTE OF COMPANY SECRETARIES OF INDIA Respondents
Through: Mr.Sandeep Sethi, Sr. Advocate
with Mr.R.D.Makheeja, Advocate
for R-1.
Mr.A.S.Chandhiok, ASG with
Mr.Sachin Datta, Mr.Bhagat Singh,
and Mr.Manikya Khanna, Advocates
for Union of India.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, CJ

Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner has prayed for declaring clause (iv) of the proviso to Rule 7 of Company Secretaries (Election of Council)

Rules, 2006 (hereinafter referred to as '2006 Rules') as ultra vires and further to issue a writ of mandamus commanding the respondents not to hold the election of the council scheduled for December, 2010.

2. Bereft of unnecessary details, the facts which are imperative to be exposted for adjudication of the writ petition are that the respondent institute, namely, Institute of Company Secretaries of India, is managed by a Council and it was earlier governed by the provisions contained under the Company Secretaries Act, 1982 (for short 'the Act') and the Regulations framed thereunder. Certain amendments were inserted in the statute by the Company Secretaries (Amendment) Act, 2006. After the amendments in the Act were brought by the Parliament, a set of Rules, namely, the Company Secretaries (Election to the Council) Rules, 2006 (for brevity, 'the 2006 Rules') were framed and it came into force w.e.f. 5th September, 2006. After the rules came into force, certain amendments were carried out in the 1982 Regulations. The significant Regulation that was obliterated on 26th July, 2010 was Regulation No. 58 (3) that provided the entitlement of a member to contest the election.

3. It is contended in the petition that clause (iv) of the proviso to Rule 7

is ultra vires the Act as it travels beyond the language employed in the enactment. A stand is also taken that by virtue of introduction of such a Rule, arbitrariness has crept in for the reason that certain members who enjoyed the benefits of membership in the Central Council before the amendment of 2006 came into force, can still be allowed further two consecutive terms.

4. Counter affidavits have been filed by the Union of India as well as by the Institute stating, inter alia, that the Rule neither suffers from the vice of incompatibility nor does it transgress the provisions in the Act. It is also urged that it does not remotely smack of any kind of arbitrariness and hence, the second limb of Article 14 of the Constitution of India is not attracted.

5. We have heard Mr.Midha, the petitioner in person, Mr.A.S. Chandhiok, learned Additional Solicitor General for the Union of India, and Mr.Sandeep Sethi, learned senior counsel along with Mr.R.D. Makheeja for the respondent-institute.

6. The singular question that emanates for consideration is whether the relevant Rule is ultra vires the provision of the Act or plays foul of Article

14 of the Constitution. Section 9 of the Act deals with the constitution of the Council of the Institute. Sub-section (2) provides for what will be the composition of the Council. The said provision reads as follows:

“9. Constitution of the Council of the Institute. -

(1) xxx

(2) The Council shall be composed of the following persons, namely:-

(a) not more than fifteen persons elected by the members of the Institute, from amongst the Fellows of the Institute chosen in such manner and from such regional constituencies as may be specified:

Provided that a Fellow of the Institute, who has been found guilty of any professional or other misconduct and whose name is removed from the Register or has been awarded penalty of fine, shall not be eligible to contest the election,-

(i) in case of misconduct falling under the First Schedule of this Act, for a period of three years;

(ii) in case of misconduct falling under the Second Schedule of this Act, for a period of six years,

from the completion of the period of removal of name from the Register or payment of fine, as the case may be;

(b) not more than five persons nominated in the specified manner by the Central Government;”

7. Sub-sections (3) and (4) lay postulates with regard to the persons who are ineligible to become a member of the Council. Regard being had to the

prism of challenge, we think it seemly to reproduce the said provisions:-

“(3) No person holding a post under the Central Government or a State Government shall be eligible for election to the Council under clause (a) of sub-section (2).

(4) No person who has been auditor of the Institute shall be eligible for election to the Council under Clause (a) of sub-section (2) for a period of three years after he ceases to be an auditor.”

8. Section 10 deals with re-election or re-nomination to the Council. Mr.Midha rests his submissions in entirety on the said provision and, therefore, we think it apt to reproduce the same:

“10. Re-election or re-nomination to Council- *A member of the Council, elected or nominated under sub-section (2) of section 9, shall be eligible for re-election or, as the case may be, re-nomination:*

Provided that no member shall hold the office for more than two consecutive terms:

Provided further that a member of the Council, who is or has been elected as President under sub-section (1) of section 12, shall not be eligible for election or nomination as a member of the Council.”

[Emphasis supplied]

9. The relevant rule is Rule 7 of the Rules. It deals with eligibility of the members to stand for election. To have a complete picture of the controversy, it is necessitous to reproduce the said Rule:

“7. Members eligible to stand for election

Subject to other provisions of these Rules, a member who is a fellow on the first day of April of the financial year in which an election is to take place and whose name continues to be borne on the Register on the last date of scrutiny of nominations under sub-rule

(2) of rule 4, shall be eligible to stand for election to the Council from the regional constituency in which he is eligible to vote:

Provided that no person shall be eligible to stand for election to the Council, if—

(a) he has been found guilty of any professional or other misconduct and his name is removed from the register or he has been awarded penalty of fine as provided in proviso to clause (a) of sub-section (2) of Section 9 of the Act;

(b) he is holding a post under the Central or State Government as provided in sub-section (3) of Section 9 of the Act;

(c) he has been auditor of the Institute during the last three year as provided in sub-section (4) of Section 9 of the Act;

(d) he has held the office for more than two consecutive terms as provided in first proviso to Section 10 of the Act; or

(e) he has been elected as President under sub-section (1) of Section 12 of the Act as provided in second proviso to Section 10 of the Act.

For the purpose of this rule—

(i) the penalties awarded to a person before coming into force of the Company Secretaries (Amendment) Act, 2006 or penalties awarded to a person after coming into force of the Company Secretaries (Amendment) Act, 2006 for offences committed before the coming into force of the same, shall also be taken account for the purpose of attracting disqualification under clause (a) of the proviso above.

(ii) a person drawing salary from the Consolidated Fund of India or the Consolidated Fund of a State, as the case may be, or from anybody corporate or any organization where the Central Government or the state government own individually or jointly a majority stake, shall be deemed to be a person holding a post under the Central Government or the State Government, as the case may be, for the purpose of attracting of disqualification under clause (b) of the proviso above.

(iii) for a person who has been the auditor of the Institute before coming into force of the Company Secretaries (Amendment) Act, 2006, the three year period limitation provided under Sub-section (4) of Section 9 of the Act shall also include the period between his ceasing to be an auditor and the coming into force of the Company Secretaries (Amendment) Act, 2006.

(iv) the number of term(s) of Office held by a person as a member of the Council either under clause (a) or under clause (b) or partly under clause (a) and partly under clause (b) of sub-section (2) of Section 9 of the Act, prior to coming into force of the Company Secretaries (Amendment) Act, 2006, shall not be taken into account

for reckoning of the two consecutive terms for the purpose of disqualification under clause (d) of the proviso above.

(v) the holding of the office of the President of the Institute of sub-section (1) of Section 12 of the Act, prior to coming into force of the Company Secretaries (Amendment) Act, 2006, shall also be taken into account for the purpose of attracting disqualification under clause (e) of the proviso above.

10. Clause (iv) of the proviso to Rule 7 is under assail. On a scanning of the anatomy of clause (iv), it is clear as noon day that a person who is elected under sub-section (2) of Section 9 of the Act prior to coming into force of the Amendment Act of 2006 shall not be taken into account for reckoning of the two consecutive terms for the purpose of disqualification under clause (d) of the proviso. Clause (d), in its turn, refers to Section 10 of the Act. The proponement of Mr. Midha is that the first proviso to Section 10, if appositely interpreted, would convey that the past period has to be reckoned and once the Statute conveys that the same has to be computed or reckoned, the Rule cannot stipulate otherwise as the same would absolutely be in contravention of the provision.

11. To appreciate the submission, it is necessary to understand what exactly the legislative intendment is. The amendment to the Act was

brought into force with effect from 8.8.2006. The first part of the Section permits re-election and re-nomination. The proviso curtails the same by laying down that no member shall hold the office for more than two consecutive terms. The member would include an elected or a nominated member. The expression used is “no member shall hold the office”. The employment of the term “shall”, we are disposed to think, in the context, is prospective in nature. In this context, we may refer with profit to certain citations in the field. In ***Keshavan Madhava Menon v. State of Bombay***, **AIR 1951 SC 128** it has been laid down that every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operation.

12. In ***P.Mahendran v. State of Karnataka***, **AIR 1990 SC 405 : (1990) 1 SCC 411** it has been held that it is well settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If a rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective

only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure.

13. In ***K.Kuppusamy v. State of T.N.***, (1998) 8 SCC 469 it has been ruled that an amendment would be prospective in nature unless expressly or by necessary implication found to be retrospective.

14. In ***MRF Ltd. v. CST***, (2006) 8 SCC 702 the Apex Court has laid down that the provisions of the Act or notification are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect.

15. In ***S.L.Srinivasa Jute Twine Mills (P) Ltd. v. Union of India***, (2006) 2 SCC 740 after referring to the decision in ***Keshavan Madhava Menon*** (supra) laid down the principle that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Similar view has been expressed in ***C.Gupta v. Glaxo-Smithkline Pharmaceuticals Ltd.***, (2007) 7 SCC 171, ***Kusumam Hotels (P) Ltd. v. Kerala SEB***, AIR 2008 SC 2796 and ***State of Punjab v. Bhajan Kaur***, AIR 2008 SC 2276. If the

language employed in Section 10 of the Act is scrutinized, it is clear as crystal that the same cannot be given any kind of retrospectivity or retroactivity. The legislature intended that after the provision would come into force the member elected or nominated shall not hold the office for more than two consecutive terms. Once the language of a Statute is absolutely clear and unambiguous, there is no need or necessity to read anything to it or to interpret it in any other manner. To understand the said provision to be prospective is in consonance with the language employed as the legislative intent neither expressly shows nor by necessary implication suggests that the legislature intended to convey that the provision would cover the past period.

16. At this juncture, it will be profitable to refer to Section 38A of the Act. The said provision confers power on the Central Government to make Rules. Sub-section (1) to Section 38A empowers the Central Government, by notification, to make rules to carry out the provisions of the Act. Sub-section (2) enables the Central Government to provide the manner of election and nomination in respect of members to the Council under sub-section (2) of Section 9. Thus, the Government has been empowered to

frame rules for carrying out the provisions of the Act. The proviso (iv) to Rule 7, if properly appreciated, is clarificatory in nature. To elaborate, the previous period is not to be reckoned so that no doubt creeps in. A clarificatory Rule being in accord with the prescription of the Act is in the realm of permissibility. It is a well known principle of law that if there is a provision in a statute or a rule and if they compete with each other, the main provision has to prevail. A rule may supplement the provision in the Act but cannot supplant the same.

17. In this context, we may refer with profit to a three-Judge decision in ***Jarnail Singh v. The Secretary, Ministry of Home Affairs and others, AIR 1994 SC 1484*** wherein the Apex Court while dealing with Rule 9 of the Central Civil Services (Pension) Rules, 1972 and the stand of the appellant therein that the said rule did not include gratuity to enable withholding payment of gratuity in addition to withholding the pension amount, it was contended before the Apex Court that amendment was made in the Rules in 1991 to expressly include gratuity also in Rule 9 in addition to pension and, therefore, it could not be construed to confer that power in respect of gratuity was also in addition to pension. After reproducing Rule 9, their Lordships expressed the view as follows:-

“In our opinion, the definition of ‘pension’ in R.3(1)(o) quoted above negatives the appellant’s contention and clearly indicates that the 1991 Amendment is merely clarificatory and makes explicit that which was clearly implicit prior to that Amendment by virtue of the definition of term ‘pension’ in R.3(1)(o). This clarification appears to have been made only to remove the doubt created by the decisions relied on by counsel for the appellant which are considered hereafter.”

We have referred to the aforesaid decision solely for the purpose that the proviso (iv) to Rule 7 of the 2006 Rules has only clarified or elaborated to remove any kind of doubt, if any, and by no stretch of imagination it can be construed that it supplants the main provision or runs counter to it. Thus, we are unable to accept the submission of Mr.Midha and accordingly we repel the same.

18. The second submission of Mr.Midha is that the Rule is wholly arbitrary and unreasonable. The petitioner would urge that by virtue of not taking into consideration the earlier period, a premium is given to the members who had already contested and held the post of member of Council. It is not disputed that the said Rule is uniformly applicable. When a Rule is uniformly applicable to all concerned and a cut-off date is provided in the Act for the purpose of reckoning which has a reasonable nexus with the date of coming into force of the Act, it cannot be said to be unreasonable

or arbitrary, more so, when the object of the Act is for the regulation and development of the profession of company secretaries. Mr. Midha has commended us to the decisions reported in *N. Chandrappa v. Registrar*, 1990 (1) KAR LJ 107, *Anandrao Dinkarrao Shinde & Anr. v. P.G. Patil & Ors.*, AIR 1977 Bombay 177 and *Kaamareddy Suryanarayana & Anr. v. The District Cooperative Office, the West Bengal Co-operative Sugars Ltd. & Ors.*, AIR 1976 AP 340. On a perusal of the said decisions, we find that they relate to the interpretation process but not to the constitutionality of the provision and, hence, we are not inclined to dwell upon the same.

19. We may fruitfully note that prior to the amendment in the Act and the Rules, the elections were governed by the Regulations, but the same have become totally extinct. The controversy can be viewed from another angle. A person to become a member of the Council has to contest in the election. Contesting an election is basically a statutory right. In the case of *Javed & Ors. v. State of Haryana & Ors.*, AIR 2003 SC 3057, a three-Judge bench of the Apex Court referred to the decisions in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64, *Jagan Nath v. Jaswant Singh & Ors.*, AIR 1954 SC 210, *Jyoti Basu & Ors. v. Debi*

***Ghosal & Ors.*, AIR 1982 SC 983 and *Jamuna Prasad Mukhariva & Ors. v. Lachhi Ram & Ors.*, AIR 1954 SC 686** in the context of right to contest an election for an office in Panchayat after the 73rd amendment of the Constitution whereby Chapter IX was incorporated. Their Lordships have expressed thus:

“22. Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right – a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is nothing wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.”

20. Thus, the right to contest in an election primarily being a statutory right, and the Rule under assail being uniformly applicable, cannot be held to be arbitrary or capricious. What is contended by the petitioner is that the persons who had already enjoyed the benefit of the office on two prior occasions would be in a position to contest the election and in all fairness

they should have been treated to be ineligible. The Statute, as we have held, does not prohibit the same. The Rule in question only stipulates that their previous period shall not be reckoned. The petitioner is in no way, debarred to contest the election. The stand is that previous office holders should have been prohibited. We are unable to fathom the rationale behind such a challenge. In any case, solely because the previous period is not reckoned, the Rule cannot be held to be arbitrary or unreasonable.

21. In view of our aforesaid analysis, both the grounds raised by Mr.Midha do not merit consideration and, accordingly, the writ petition is dismissed without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J

FEBRUARY 08, 2011

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