HIGH COURT OF JUDICATURE AT BOMBAY

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6911 OF 2000

Shasakiya – Nimshasakiya Aushadh Nirmata Mishrak Sanghatana, Maharashtra Rajya, Mumbai
Through its General Secretary
Shri R.A. Gangurde …Petitioner

Versus

1. Secretary Pharmacy Council of India & Ors.
Temple Lane, Kotala Road,
New Delhi – 2

2. Maharashtra State Pharmacy Council,
ESIS Hospital Compound,
L.B.S. Marg, Mulund (W).

3. Director of Health Services Maharashtra State, St. Jorge Hospital Compound, Mumbai C.S.T.

4. Jt. Director of Health Services Maharashtra State Central Bldg., Near Sasoon Hospital, Pune 1.

5. Secretary of Health, Mantralaya, Mumbai 32.

6.Secretary of Medical Education, Mantralaya, 1st Floor, Mumbai 32.

7. Commissioner Employees State Insurance Scheme (Govt. of Maharashtra)
Panchdeep Bhavan, N.M. Joshi Marg,
Lower Parel, Mumbai 400 013.

8. State of Maharashtra …Respondents

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Mr. M.V. Limaye, for the Petitioner.
Mr. G. Hariharan, i/b Mr. A.A. Ansari for Respondent No.1.
Mr. R.V. Govilkar, for Respondent No.2.
Mr. A.I. Patel, AGP for Respondents Nos. 3 to 8.

CORAM: A.S. OKA AND
RIYAZ I. CHAGLA, JJ.
DATED: 10th August 2017

ORAL JUDGMENT (Per A.S. OKA,J.)

1. Heard the learned counsel appearing for the Petitioner, learned counsel appearing for the Respondent Nos.1 and 2 and the learned AGP appearing for Respondent Nos. 3 to 8.

2. The controversy in this Writ Petition under Article 226 of the Constitution of India revolves around Section 42 of the Pharmacy Act, 1948 (for in short "**the said Act**".). Section 42 reads thus :-

> "Dispensing by unregistered person. – (1) On or after such date as the State Government may by notification in the Official Gazette appoint in this behalf, no person other than a registered pharmacist shall compound, prepare, mix, or dispense any medicine on the prescription of a medical practitioner;
>
> Provided that this sub-section shall not apply to the dispensing by a medical practitioner of medicine for his own patients, or with the

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> general or special sanction of the State Government, for the patients of another medical practitioner.
>
> Provided further that where no such date is appointed by the Government of a State, this sub-section shall take effect in that State on the expiry of a period of (eight years) from the commencement of the pharmacy (Amendment) Act, 1976.
>
> (2) Whoever contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one thousand rupees or with both.
>
> (3) Cognizance of an offence punishable under this Section shall not be taken except upon complaint made by (order of the State Government or any officer authorised in this behalf by the State Government or by order of the Executive Committee of the State Council.

3. We may note here that the second proviso was brought on the statute book by Act No.70 of 1976 with effect from 1st September 1976. Originally in the second proviso, the period of five years was provided which was increased to eight years by Act No.22 of 1982 which came into force with effect from 1st September 1981.

4. The Petitioner is a union registered under the Trade

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Unions Act, 1926, which represents compounders (Mishraks), who are in the employment of either the Government of Maharashtra or Employees' State Insurance Scheme of the Government of Maharashtra. This Petition is filed on behalf of 112 members of the Petitioner, who were appointed from 1970 onwards till 31st August 1984 as compounders either in the employment of the State Government or in the employment of the Employees' State Insurance Scheme.

5. The first challenge in this Petition is to the communications dated 3rd April 2000, 1st June 2000 and 20th October 2000 (**Exhibits "C", "D" & "E" to the Petition**). Exhibit "C" is the communication dated 3rd April 2000 issued by the Directorate of Health Services of Government of Maharashtra, which records that Sub Section 1 of Section 42 of the said Act has come into force with effect from 1st September 1984. It records that compounders (Mishraks) who were appointed prior to 1st September 1984 were still in Government service in various hospitals. The said communication records that a facility was made available of providing short courses to such employees to enable them to

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get registered as pharmacists. However, such short courses available in various Pharmacy Colleges were closed. It refers to a Government decision which provides that the posts of Mishraks will continue till the persons already occupying the said posts are in service. On the dates of their respective superannuation, the posts will come to an end. It further records that those employees holding posts of Mishraks are working either in Civil Hospitals or Cottage Hospitals should be transferred to Rural Hospitals and in their place, registered Pharmacists should be appointed which will facilitate dispensing of scheduled drugs. It records that for the time being, those who are working on the post of Mishraks and those who have not obtained registration as a Pharmacist under the said Act will continue to be in service.

6. The second impugned communication is issued on 1st June 2000 (Exhibit 'D') again by the Directorate of Health Services though its Joint Director. The said communication reiterates that it is not necessary to discontinue employment of those Mishraks, who are not registered under the said Act. However, they need to be transferred and they can be

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accommodated to work in godowns. It is stated that termination of those who are in the employment but those who are not registered under the said Act should be avoided as State Government will have to face litigation. The third impugned communication is dated 20th October 2000 (Exhibit 'E') issued by the Deputy Director of Health Services, Government of Maharashtra. It records that by a letter dated 5th October 2000, the State Government has directed that with effect from 1st September 1984, those compounders, who have not obtained registration as a Pharmacist under the said Act cannot perform the work of dispensing medicines and, therefore, they shall be accommodated in Group-D posts. The communication records that those compounders / Mishraks who are willing to work in Group-D posts should give their consent in writing.

7. The first submission of the learned counsel appearing for the Petitioners is that the provisions of sub section 1 of the Section 42 cannot be applied retrospectively to those compounders who were in the employment as on 1st September 1984. In support of his submission, he placed

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reliance on three decisions of the Apex Court in the cases of ***Suresh Pal & Ors. Vs. State of Haryana& Ors.[1], Shyam Sunder & Ors. Vs. Ram Kumar & Anr.[2]*** and ***Commissioner of Income Tax (Central) New Delhi Vs. Vatika Township Private Ltd.[3]*** respectively. He also relied upon the decision of a Division Bench of this Court in the case of ***Narendra S/o. Sakharam Jadhav Vs. State of Maharahstra & Ors.[4]***.

8. The second submission is that those who are in service prior to 1st September 1984 were not granted opportunity of obtaining registration by providing facility to them of undergoing necessary training courses. He would, therefore, submit that, it is not open for the State Government to either to revert them to Group- D post employees or to remove them from the employment. Lastly, he submitted that the judgment and order dated 15th March 2011 passed by the Division Bench of this Court in Writ Petition No. 3698 of 2005 filed by the present Petitioner will have no application in as

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1 (1987) 2 Supreme Court Cases 445.

2 (2001) 8 Supreme Court Cases 24.

3 (2015) 1 Supreme Court Cases 1.

4 2000(4) ALL MR 137.

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much as the present Petitioner filed the said Petition on behalf of its members who were appointed after 1st September 1984 and who were not in registered as Pharmacists under the said Act. He submitted that the present Petition is filed the Petitioners representing those compounders (Mishraks) who are appointed prior to 1st September 1984.

9. The learned counsel for the 2nd Respondent submitted that the issues raised in this Petition have been dealt with and negatived in the aforesaid decision dated 15th March 2011. The learned AGP representing the State Government supported the impugned communications.

10. We have given careful consideration to the submissions. As stated earlier, the first challenge in this Petition is to the three communications. In prayer (b), a Writ of Mandamus is prayed for directing (i) the Respondents to treat the members of the Petitioner mentioned in Annexure "A" as trained and qualified, (ii) the second Respondent to register the members mentioned in Annexure A in accordance

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with Section 42 of the said Act, and (iii) the Respondents not to initiate any action pursuant to impugned communications. In the alternative, it is prayed that an opportunity may be provided to the members whose names appear in Annexure A to qualify themselves for registration as Pharmacists under the said Act and to get them registered as Pharmacists under the said Act.

11. As far as clauses (i) and (ii) of prayer (b) are concerned, we may note here that such prayers cannot be granted for the simple reason that under sub-section 2 of Section 42 of the said Act, the contravention of sub-section (1) Section 42 is made punishable offence which attracts punishment of imprisonment for a term which may extend to 6 months or with fine to the extent of Rs.1000/- or of both. Grant of declaration as prayed for will be completely contrary to sub-section (2) of Section 42. Hence, the same cannot be granted.

12. Now we come to the judgment and order dated 15th

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March 2011 in Writ Petition No. 3698 of 2005 filed by the present Petitioner on behalf of its another set of members. Paragraph 2 of the said judgment records that the members of the Petitioner were qualified Pharmacists but they were not registered as Pharmacists under the said Act. Their case was that as the said members were discharging duties as compounders and handling medicines for more than 20 years, they should be treated as qualified Pharmacists. In paragraph 2, the Division Bench held thus:-

> ***It is not in dispute that the members of the association are not qualified pharmacists as prescribed by Section 42 of the Act. Though they may be doing the work of handling medicines since many years, in our view, that cannot be a ground for treating them as registered pharmacist. Since members of the Petitioner-association are not qualified as per Section 42 of the Act, no directions can be issued to the authority to register them as pharmacists. As a matter of fact, they should not have been allowed to continue further in the matter of handling medicines since admittedly they are unregistered pharmacists and there is a bar under Section 42 of the Act by which unregistered pharmacists cannot be allowed to act as pharmacists. The petitioners accordingly are not qualified to be appointed as pharmacists. Even though it may true that the members of the Petitioner association are successfully handling the medicines, yet it is dangerous to allow them to continue with the said work when they are not qualified as per***

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the Act.

13. Though the said Petition was dismissed, the Division Bench directed that no action shall be taken against the members of the Petitioner Association, unless they are given an opportunity of being heard. The Division Bench directed that show cause notice should be given to the members of the Petitioner and after considering their reply, appropriate penal action may be taken in accordance with law. However, the Division Bench made it expressly clear that none of the members of the Petitioner association shall be allowed to continue to work in the matter of handling medicines by working as Pharmacists / compounders since there are not qualified Pharmacists under the said Act.

14. We have already quoted Section 42 of the said Act. We may note that sub section 1 of Section 42 was always a part of the said Act. Only the second proviso was added with effect from 1st September 1976, which was amended with effect from 1st September 1981. The effect of the second proviso is that if no such date as mentioned in sub-section 1

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of Section 42 is appointed by the State Government, the said sub-section shall take effect in the State on the expiry of period of eight years from 1st September 1976. Admittedly, the State Government did not issue any notification as contemplated by sub-section 1 of Section 42 till the expiry of period of eight years from 1st September 1976. Therefore, by operation of the of the second proviso to sub-section 1, the prohibition imposed by sub-section 1 of Section 42 came into force with effect from 1st September 1984. Thus, from 1st September 1984, no person other than a registered pharmacist was entitled to compound, prepare, mix or dispense any medicine on the prescription of a registered medical practitioner. The registered pharmacist is defined in clause (i) of Section 2 of to mean a person whose name is for the time being entered in the register of the State in which he for the time being is residing or carrying in his profession or business of Pharmacist.

15. Considering this legal position, there is no difference between the members of the Petitioner who are unregistered Pharmacists and who were appointed prior to 1st September

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1984 and those who were appointed on or after 1st September 1984 and therefore, in our view, the decision of the Division Bench of this Court dated 15th March 2011, is squarely applicable to the facts of this case and no relief can be granted.

16. Nevertheless, we proceed to consider the submissions made by the learned counsel appearing on behalf of the Petitioners on merits. As far as the third submission that the judgment and order dated 15th March 2011 will have no application is concerned, for the reasons recorded above, the said submission stands rejected.

17. In the Affidavit in Reply of Shri V.B. Sawant, it is stated that an opportunity was made available to the persons belonging to the category of the members of the Petitioner to undergo condensed pharmacy courses. Accordingly, it is stated in the Affidavit dated 17th July 2001 on pages 53 and 54, which read thus:-

The Pharmacy Council of India, however, vide

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> ***its letter, dated 18th May 2001 has turned down the said request. Annexed hereto as Annexure '3' is copy of the letter, dated 18th May 2001. In the said letter, the Pharmacy Council of India has further pointed out that in Education Regulation, 1953, Education Regulation 1972, Education Regulation 1981, there was a special provision for such person to undergo condensed Pharmacy Course, which was in force for approximately 27 years from 1957 to June 1984, therefore, the opportunity should have been availed by such unqualified persons. The Pharmacy Council of India also brought to the notice of State of Maharashtra that the Hon'ble Supreme Court vide its Judgment 12th December 1997 has upheld the necessity of qualified persons for handling the drugs.***

18. Thus the factual statement is that condensed pharmacy course was available for 27 years from 1957 to 1984. We may also note here that those were appointed prior to 1st September 1984 were always aware of amended sub section 1 of Section 42 which was on the statute book from the year 1960. Those who were appointed after 1st September 1976 were also aware that provisions of the sub section 1 of Section 42 will come into force in any event with effect from 1st September 1984. Even assuming that condensed courses as contended by Shri Sawant were not available, there was no legal obligation of the State Government to make available

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such courses to the members of the Petitioner to enable them to obtain registration as a Pharmacist under the said Act. Therefore, we do not accept the submission that it was the duty of the government to make available an opportunity to the said members of the Petitioner to obtain registration by undergoing necessary course. At this stage, we may point out that the Petitioner is relying upon the Government Resolutions (GRs) dated 5th February 1990 and 20th October 1995 annexed to Additional Affidavit of the Petitioner. We have perused the GR dated 5th February 1990. This has nothing to do with the controversy in hand. It deals with the issue of absorption into regular service of those who were appointed prior to 18th June 1992 without undergoing selection process through Regional Recruitment Boards. The GR dated 20th October 1995 deals only with the change of name of the post of compounder (Mishrak). This has nothing to do with the regularisation of the employment of the unregistered Pharmacists.

19. Now coming to the first submission that the second proviso to sub-section 1 of Section 42 should not be

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retrospectively applied to those who were already in service with effect from 1st September 1984, the first decision relied upon by the Petitioner in the case of ***Suresh Pal & Ors (supra)***. This was a case where a certificate course in physical education of a institution in Amravati in State of Maharashtra was recognised by the State of Haryana for the appointment to the post of Physical Training Instructors in Government Schools. The Petitioner before the Apex Court joined the certificate course of the said institution at Amravati and was receiving instruction in the said institution at Amravati until 9th January 1985. In paragraph 3, the Apex Court observed thus :-

> ***"We are of the view that since at the time when the Petitioners joined the course, it was recognised by the Government of Haryana and it was on the basis of this recognition that the Petitioners joined the course, it would be unjust to tell the Petitioners now that though at the time of their joining the course it was recognized, yet they cannot be give the benefit of such recognition and the certificates obtained by them would be futile, because during the pendency of the course it was de-recognized by the State Government on January 9, 1985".***

20. In the case of ***Shyam Sundar (Supra)***, the Apex Court

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considered the issue of whether the amending Act was prospective or retrospective in operation. In the present case, the statutory provision of sub-section (1) of Section 42 always existed. Out of the 112 persons whose names appear in Annexure "A", many were in employment on 1st September 1976, when the second proviso was added. In any case, as per the second proviso, sub-section (1) of Section 42 was to come into force in any event on 1st September 1984. Thus, those who were in service on 1st September 1976, the period of eight years was available to obtain the necessary qualification and the consequent registration.

21. The decision of the Apex Court in the case of ***Commissioner of Income Tax (Central) (Supra)*** also deals with the issue of retrospective operation of the amended provision. In the case of ***Narendra S/o. Sakharam Jadhav (Supra)***, the Division Bench of this Court dealt with the case, where the Petitioner had joined course of Diploma in Teaching granted by an University in Madhya Pradesh, which was recognised in Maharashtra. But the recognition was withdrawn with effect from 3rd May 1993. The Division

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Bench followed the law laid down by the Apex Court in the case of ***Suresh Pal (Supra).*** None of the decisions will have application to the facts of the presence case as the issue of retrospective operation of a statute does not arise at all in the present case.

22. The Petition is based on apprehension that either the members of the Petitioner will be terminated or be reverted in a lower Group - D post. It is stated that the persons whose names appear in Annexure - "A" are permanent employees. Therefore, it is obvious that no action of termination or of placing the members of the Petitioner in lower pay scale can be taken without complying with the provisions of the relevant service Rules and without complying with the principles of natural justice. Similar directions have been issued by this Court in the judgment and order dated 15th March 2011.

23. Accordingly we pass following order:-

(a) Writ Petition is rejected. Rule is discharged with no order as to costs.

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(b) We make it clear that no member of the Petitioner whose name appears in Annexure “A” shall be removed from the employment or shall be reverted to the lower pay scale or post without issuing a show cause notice and without giving an opportunity of being heard to the members in accordance with law.

(c) At this stage, the learned counsel for the Petitioner prays for continuation of ad interim relief which was granted by the order dated 13th December 2000. This prayer is opposed by the contesting Respondents. As ad interim relief is operative for such a long time, we deem it proper to continue the same for a period of eight weeks from the date on which this judgment and order is uploaded.

(RIYAZ I. CHAGLA J.) **(A.S. OKA, J)**

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