

(1990) 02 CAL CK 0043

In the Calcutta High Court

Case No : F.M.A.T. No's. 2682, 2697 and 2889 of 1989

Chinmoy Sarkar and etc.

APPELLANT

Vs

Md. Shaniat Hossain and etc.

RESPONDENT

Date of Decision : 08-02-1990

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : AIR 1990 Cal 412 : 94 CWN 425 : (1994) 1 ILR (Cal) 82

Hon'ble Judges : P.D. Desai, C.J.;Shyamal Kumar Sen, J

Bench : Division Bench

Advocate : P.K. Mukherjee, Amal Kumar Mitra, S. Pal, Jaideep Gupta, Dinabandhu Daw and Sanat Kumar Seal, for the Appellant; S.N. Chowdhury and Mujibar Rahaman, for the Respondent

Judgement

P.D. Desai, C.J.—These three appeals arise out of a writ petition instituted by one Md. Shaniat Hossain, hereinafter called "the Writ Petitioner", seeking a writ against the appellants not to give effect or further effect to the Letter of Intent dated December 23, 1987 (Ann. "C" to the Writ Petition) issued by the Hindusthan Petroleum Corporation Limited, hereinafter called "the Corporation" in favour of one Shri Chinmay Sarkar, hereinafter called "Sarkar", for the proposed Retail Outlet Dealership at Daulia, District Midnapore. The Writ Petition was allowed by the Trial Court by its judgment rendered on August 18, 1989. The said Letter of Intent was quashed and a direction was issued, amongst others, to the Oil Selection Board (East), hereinafter called "the Board", to make a fresh selection on the basis of materials available to them including the Enquiry Report and in accordance with law.

F.M.A.T. No. 2682 of 1989 is preferred by Sarkar, F.M.A.T. No. 2697 of 1989 is preferred by the Board and F.M.A.T. No. 2889 of 1989 is preferred by the Corporation.

Since common questions of law and fact are involved in all the three companion matters, they have been heard together and are being disposed of by this

common judgment.

2. In order to appreciate the points in dispute, a few facts require To be stated.

The Corporation is a wholly-owned Government Company carrying on business in Petroleum Products. The Board is an independent authority constituted by the Oil Industry in consultation with the Ministry of Petroleum for the purpose of selection. of candidates for the Dealership/Distributor-ship of the Public Sector Oil Companies within its jurisdiction including the Corporation. The Board consists of two members a retired High Court Judge and a retired Civil. Servant.

On December 14, 1985 an advertisement was published by the Corporation inviting applications from persons belonging to the unemployed graduate category for retail dealership in Petroleum Products at Daulia, District Midnapore. The Writ Petitioner and Sarkar were amongst the applicants and their applications along with those of others were forwarded to the Board by the Corporation after preliminary scrutiny on May 30, 1986. On September 11, 1987 the Board interviewed nine applicants including the Writ Petitioner and Sarkar. Pursuant to the interview a panel consisting of three candidates was prepared for the purposes of further investigation. Sarkar and the Writ Petitioner were placed on the said panel at serial Nos. 1 and 2. One Gautam Kr. Pal was the third person to be empanelled but he does not appear to be interested in the present litigation.

As per the usual policy or practice, a Field Investigation was carried out by the Corporation and the report of such investigation was submitted to the Board on November 25, 1987. After considering the materials on record including the Field Investigation Report, the Board prepared a panel according to merit and forwarded the same to the Corporation on December 9, 1987. The panel consisted of Sarkar, the Writ Petitioner and Gautam Kumar Pal the names having been arranged in the said order of merit. Pursuant to the receipt of the panel, the impugned Letter of Intent was issued by the Corporation to Sarkar on December 23, 1987.

3. On October 5, 1988, the writ petition out of which these appeals arise was moved before the Trial Court seeking the reliefs aforementioned. Rule Nisi was issued on the same day and the respondents were restrained by an ad-interim order from giving effect or further effect to the impugned Letter of Intent and/or from selecting/appointing Sarkar or any other person as Dealer for the Retail Outlet at Daulia. The Writ Petition was hotly contested. The Corporation, Board and Sarkar filed affidavits-in-opposition and the Writ Petitioner filed affidavits-in-reply.

At the hearing of the Writ Petition the original records of the Board were produced for the perusal of the Trial Court. Upon gleaning the records including the Field Investigation Report the Trial Court recorded the following finding :

XX XX XX "It appears from the records that while the petitioner satisfactorily fulfilled all the conditions for appointment of Retail Outlet Dealership, the

respondent No. 6, on the other hand, failed to do so as he could not show his financial capability and could not procure a suitable plot of land for such dealership."

The Petitioner and respondent No. 6 referred to in the above-extracted portion are the writ petitioner and Sarkar respectively. The Court then proceeded to record a further finding as follows :

"As such, going through the records, this Court is of the view that the Co-ordinator, Oil Selection Board (East), the respondent No. 2, has not properly considered the candidature of the Writ Petitioner, the respondent No. 6 and Gautam Kumar Pal with due regard to the facts, the field investigation report and also not given the relevant consideration to the eligibility criteria and, as such, the said selection in favour of respondent No. 6 is liable to be set aside."

Rule was, therefore, made absolute in terms of the order set out at the commencement of this judgment.

Hence the present appeals.

4. Now, it must be pointed out at the outset that this Court in Writ Jurisdiction cannot sit in appeal over the selection of a Dealer for a Retail Outlet made by the Board. True, the Corporation and the Board are amenable to the Writ Jurisdiction since they are "State" within the meaning of Article 12 and also "authority" or "person" within the meaning of Article 226, and what is involved is the selection for Retail Dealership of Petroleum Products which are items or articles of monopoly business carried on by a wholly-owned Government Company. However, the exercise of such jurisdiction and the judicial reviewability of such selection are subject to the well-known limitations. If the selection is vitiated by a arbitrary or irrational exercise of power or by malafides or is based, on no materials or made on the basis of irrelevant materials or by ignoring relevant factors including eligibility, the Writ Court would and should, on proof of the relevant facts, grant an appropriate relief. However, it is not for the Writ Court to delve deep into the records of the Board or the Corporation and to examine the validity of the rival claims upon appreciation afresh of the materials on such record and, on the basis of such reappraisal, to decide whether the selection was properly made and to give effect to such decision by the issue of a Writ. It cannot be overlooked in this connection that the Board, which is vested with the function of selection, is an independent entity. It is a high level body consisting of a retired High Court Judge and a retired Civil Servant. Ordinarily, there would be minimal scope for alleging malafides against such a body although it can conceivably be alleged and proved in a given case that the selection made by it is otherwise vitiated.

5. It is apparent from a perusal of the judgment under appeal that the final direction therein given rests on two findings : first, that proper consideration was not given to the candidature of the Writ Petitioner and that of Sarkar and Pal with due regard to facts and to the Field Investigation Report and, secondly, that

whereas the Writ Petitioner satisfied the eligibility criteria Sarkar failed to do so since he could not establish the conditions of appointment relating to financial capability and availability of a suitable plot of land. The finding on the question of eligibility goes to the root and it is necessary at the threshold, therefore, to consider whether or not these two factors enumerated by the trial Court really formed part of the eligibility criteria prescribed by the Corporation. Be it stated that at the hearing of these appeals also, this was the bone of contention between the parties.

6. Annexure "A" to the Writ Petition is a document titled "Eligibility Criteria For Award of Dealership/ Distributorships under "UG" (including UEG) Category", the said annexure consists of Part I and Part II. Part I begins with the following endorsement which being material is reproduced hereinbelow:

"Please Note the following carefully :

You should submit the application form with prescribed application fee only if you conform to the following eligibility criteria. Please note that in case you do not meet the same, your application will be rejected without assigning any reasons. No correspondence will be entertained."

In nine different columns thereafter are set out the various eligibility criteria and the heading of each column reads as follows:

1. Nationality
2. Age
3. Educational Qualification
4. Residence
5. Relationship
6. Income
7. Partnership
8. Co-operative Societies
9. Employed / Self Employer/ Temporarily Employed.

It will be seen that none of the columns prescribes the availability of a plot of land for setting up the Dealership/Distributorship business as an eligibility criterion. According to the condition prescribed against the column bearing the heading "INCOME", a candidate should not have income of more than Rs. 24,000/- per annum. The income for this purpose would include income of the candidate and of his/her spouse and dependent children put together. Only in case the candidate happens to be dependent on his/ her parents, his/her parent's income would also be taken into consideration for computing the total income. The only requirement, therefore, which is to be satisfied as per this

column is that the income of the candidate as therein defined should not exceed Rupees 24,000/- per annum. Be it noted that there is no reference to the financial capability of the candidate, that is, the capacity to invest a certain sum of money for carrying on the business.

Part II contains a note at the top which reads as follows:

"Please ensure compliance of the following conditions while submitting the application."

The text below the said note mainly contains instructions and information on several matters/points. It contains mostly guidelines on the manner in which application forms are to be filled and its accompaniments and information on certain matters such as advance of loans by banks and the tenure of Dealership/Distributorship. There are two matters specified in this Part which can be considered as relating to eligibility since they prescribe disqualifications. Clause V debars employees of all companies under the Ministry of Petroleum, New Delhi, from applying for Dealership/Distributorship. Certain restrictions are also placed on the relations of existing employee and ex-employee in the matter of applying for Dealership/Distributorship. Clause IX prescribes that persons convicted/being tried for any criminal offence involving moral turpitude/ economic offence and against whom charges have been framed by the Court would not be eligible for Dealership/ Distributorship. Clause (viii), which may also be referred to, reads as follows:

"If the documentary evidence produced by the candidate at any stage is found to be incorrect, his/her application is liable to be rejected without assigning any reasons and in case if he/she has been appointed as a dealer/distributor, his/her dealership/distributorship is liable to be terminated."

This clause is apparently not an eligibility criterion. It reserves power or confers right on the appropriate authority to reject the application or to terminate the Dealership/ Distributorship, if the documentary evidence furnished by the candidate at any stage is found to be incorrect.

None of the other clauses in Part II need be adverted to since they do not have the remotest bearing on the eligibility criteria.

7. In light of the foregoing discussion, it is clear that even under Part II, financial capability and availability of a suitable plot are not the eligibility criteria. The conclusion is inevitable, therefore, that the Trial Court, with respect, erred in regarding those two factors, viz., financial capability and availability of a plot of land, as eligibility criteria in respect of appointment for Dealership/Distributorship.

The question then is whether financial capability and availability of a plot of land, even if they are not eligibility criteria, are material factors to be kept in view at the time of selection. To answer this question, we must turn first to the application form which a candidate for Dealership/Distributorship in the category

in question is required to fill up. Amongst several matters on which information is sought from the intending candidates, in the various columns of the application form, three have a direct bearing on this aspect of the case.

Columns 12, 13 and 14 of the application form in so far as relevant for the purposes of the present case read as follows:

"12 *****

For Retail Outlet dealerships only :

(i) Do you have a suitable site readily available or can you arrange one in the area advertised within four months? If yes, please give details.

13. This dealership/distributorship requires an approximate investment of Rs. 95,000/- excluding the value of land for the construction of a godown or retail outlet or bulk storage facilities for SKO/LDO.

14. Give details of sources of funds :

(a) Cash in hand.

(b) Cash in Bank.

Name of Bank Current A/c SB A/c FDR Amount

** (c) Any other sources (including loans) amount

(d) Name(s) of business or credit reference(s):

Please bring documentary evidence in support of (a) to (d) above at the time of interview.

**In case of loans to be secured from sources other than Banks/Financial Institutions, please attach affidavit as per Appendix A".

8. The queries raised and the information sought from the candidates as per these columns would indicate that the availability or procurement of a suitable site in the area advertised within a reasonable time and the wherewithal to meet the cost of construction of the Retail Outlet are amongst the several factors to be kept in view while making the selection. An eligible candidate may have readily available site or the potentiality to arrange for one and the resultant ability to start the Retail Outlet within a reasonable time. The construction of the Retail Outlet and the running of the business would require liquid funds or capacity to raise loans. The candidates may also have the loan-raising capability or capital base required for the same. However, it cannot be overlooked that these are relevant but not the sole factors to be taken into consideration; though

important, they are not the determinative factors. In the process of selection, many other factors such as educational/professional qualifications, selling and supervisory experience, business acumen, etc., have a play. The information required to be furnished in the other columns of the application form by a candidate have a bearing on these aspects. These various things will require to be weighed and the selection has to be made ultimately by balancing those various factors and making a comparative assessment of the merits of the competing candidates. This process of appreciating and weighing various factors and materials and -rival merits is the function of the Board which is expected to have the necessary expertise and experience. There cannot be any re-appreciation or reappraisal of these materials and factors or their relative weighing or evaluation of the comparative, merits of the competing candidates by the Court in Writ Jurisdiction.

9. A reference may be made next to the procedure followed in the matter of selection. The usual practice is that the Corporation's concerned Regional Office makes a preliminary scrutiny of all the applications received in response to the public advertisement and eliminates those candidates who are ineligible or whose applications are found- to be incomplete and/or defective. The remaining applications are thereafter forwarded to the Board which holds interview of the candidates. The performance at the interview and the documents and papers produced by the candidates are judged in accordance with the policy guidelines. The Board then empanels three candidates for the purpose of further investigation on the basis of marks obtained at the interview. The list of empanelled candidates is then forwarded to the concerned Regional Office of the Corporation with a direction to carry out Field Investigation and to submit a report. The Field Investigation is carried out by an Officer of the Corporation who makes an on-the-spot enquiry and after verification of documents he submits the Field Investigation Report which is forwarded to the Board for their consideration. The Board, upon a review of the entire materials, arrives at a final decision and prepares a list of three candidates in order of merit for the award of Dealership/ Distributorship.

10. The Field Investigation Report is submitted in a prescribed form which contains several columns. Columns 5 and 6 of the Report require particulars to be furnished about "financial capabilities" and "capability to arrange the facilities". The matters to be reported upon against these columns are similar to those that the applicant is required to furnish against columns 12 and 14 of the application form. The availability or potentiality to acquire a suitable site and the wherewithal to put up a superstructure and to run the business are thus subjected once again to scrutiny and reported to the Board which considers the same along with other materials and factors.

11. In the present case Sarkar had stated in his application form that he would be in a position to arrange for a suitable site and that he had cash in hand to the tune of Rs. 5,000/-and funds in Bank to the extent of Rupees 10,000/-. The

funds were shown to have been lying in S. B. Account No. 2450 of Indian Bank, 28, B.T. Road, Calcutta. He also disclosed that he had approached a Nationalised Bank, meaning thereby that he was negotiating for a loan.

12. The Writ Petitioner in his application stated that he would arrange to get a suitable site within four months and that he was actually negotiating for purchasing 60 decimals of lands in C.S. Plot No. 154 at Bardabar mouza. He stated further that he had no fund in cash or in Bank. He, however, mentioned that he was dependent upon his parents and that he would get financial help from his father who was a retired Executive Engineer of the South Eastern Railway.

We are not giving any particulars of the application of Gautam Kumar Pal because as earlier pointed out he does not appear to be interested in this litigation.

13. The Field Investigation Report in respect of Sarkar mentions that so far as his financial capability was concerned, he had cash in hand to the tune of Rs. 5,000/-. However, particulars of fund in Bank was not produced by him during the Field Investigation which was carried out between Nov. 12 and 15, 1987. As regards site, it was reported that it was not yet arranged but a suitable plot might be arranged as stated by Sarkar.

14. The Field Investigation Report in the case of the Writ Petitioner mentions that he had cash in hand to the tune of Rs. 10,000/- and that he was in a position to obtain financial assistance to the extent of Rupees 85,000/- from his father who had a Savings Bank Account with Allahabad Bank with a Deposit of Rs. 30,000/-, a Fixed Deposit with the said Bank in the sum of Rs. 20,000/- and National Savings Certificates of the value of Rs. 35,000/-. As regards site, the Report mentioned that a suitable site had been selected by the candidate and that he was negotiating for purchase of the same awaiting the finalisation of Dealership.

These facts are taken from the original record which was produced before the Court for its perusal and which was shown also to the learned Counsel for the Writ Petitioner.

15. It is not unreasonable to assume that the Board consisting of a retired High Court Judge and a Civil Servant must have applied its mind to all the materials available to them including the documents produced by the candidates and the Field Investigation Reports and, having weighed and considered them, they must have prepared the panel. Apart from the presumption which would legitimately arise as regards such consideration having regard to the constitution of the Board, there is evidence on record in the shape of an affidavit affirmed by the second respondent in the Writ Petition (Co-ordinator -- Oil Selection Board -- East) which places on record the procedure followed by the Board while making the impugned selection. According to the said affidavit the applications forwarded to the Board were scrutinised and sixteen candidates including the Writ Petitioner and Sarkar were called for interview. Nine candidates including the Writ

Petitioner and Sarkar duly appeared for the interview before the Board. The performance of those candidates was duly judged and documents and papers produced by them at the interview were also considered in accordance with the policy guidelines for appointment of Dealers of Retail Outlet. On the basis of marks obtained by them at the interview the Board empanelled three candidates (Sarkar, the Writ Petitioner and Pal) for the purpose of further examination. The said panel, which was prepared on the basis of merit judged with reference to the marks obtained at the interview, was forwarded to the Regional Office of the Corporation at Calcutta with a direction to carry out Field Investigation and to submit a report. The Field Investigation Reports were duly submitted to the Board. Thereafter, according to the deponent, "on the basis of the marks obtained by the candidates at the interview as well as the Field Investigation Reports" the Board prepared the final list in which Sarkar, the Writ Petitioner and Pal were placed in the first, second and third positions in order of merit. The following further averments in the affidavit being material are reproduced verbatim :

"There is no pre-requisite requirement that the candidates should have ready cash/bank balance and/or site. In any event mere fulfilling of the criteria of eligibility cannot/does not ipso facto entitle a candidate for appointment as dealer. The respondent No. 6 who has been appointed dealer duly fulfilled the criteria for eligibility. Upon a comparative assessment of all the candidates based on their performance at the interview, the documents and papers produced by them in support of their candidature as well as the field investigation report submitted by and/or on behalf of the respondent No. 7 the respondent No. 6 was found to be the most suitable candidate. The petitioner was placed in the second position in order of merit. The selection was duly made after considering all the materials on record."

16. Against the aforesaid background and taking into consideration the materials on record, we are unable to reach the conclusion that any material factor or factual material was overlooked or any extraneous consideration entered into account when the Board made the impugned selection. The entire factual data was before the Board. All the material aspects were present to its mind. The requisite procedure and policy guidelines were also followed at different stages. The Board then prepared the panel in order of merit upon appreciation of all materials and considering the relative importance to be attached to one or the other factor and upon a comparative assessment of all the candidates. This is the legitimate function of the Board. The Court cannot substitute its own judgment based upon its appreciation of these materials and the value to be attached to one or the other factor. This is the function of a forum of Appeal and not of the Writ Court. In our opinion, therefore, there was no scope for interference with the impugned selection and it could not have been upset on the ground that in the opinion of the Court the Writ Petitioner satisfactorily fulfilled all the conditions of appointment whereas Sarkar had failed to do so, since he could not show his financial capability and also could not procure a suitable plot of land.

17. Be it stated in this connection that the Board's view that it was not a pre-requisite that the candidates should have ready cash/ bank balance/site when the selection is made is correct. Column 12 of the application form, which has relevance so far as the site is concerned, refers to the ready availability or the possibility of acquiring a suitable site within four months, which obviously means within the said time limit after the Letter of Intent is issued. Columns 13 and 14, which deal with investment potential, refer to three different sources of fund, namely, cash in hand, cash in bank and any other sources (including loans). The fact that loan is also regarded as a source indicates that ready availability of funds in the form of cash or bank balance is not to be insisted upon. True, the Board has to be satisfied that the selected candidate has the potentiality to procure the site and to arrange for the requisite capital at the appropriate time but it is a far cry from saying that ready availability of site or fund is a pre-requisite for selection. The Letter of Intent issued in favour of Sarkar, which intimated that it was intended to offer the Retail Outlet Dealership to him on the condition that he would procure a suitable plot of land, either by purchase or lease, within a period of four months from the date of issue of the said letter after getting clearance from the Corporation and that he would also make the financial and other arrangements for operating the Dealership within the said time limit, also justifies this conclusion.

18. It was next urged on behalf of the Writ Petitioner that Sarkar failed to arrange for the site within the aforesaid time limit and that he was given two extensions and that, therefore, also the impugned selection must be held to have been vitiated. We are unable to appreciate this contention. These are events subsequent to the selection and they cannot be pressed into service to invalidate the selection. At the most, they may have a bearing on the cancellation of the offer of Dealership. There was a stipulation in the Letter of Intent that if the progress being made towards the fulfilment of the conditions subject to which the Dealership was offered was not satisfactory the offer was liable to be withdrawn. However, there is nothing to show that the Corporation had no power to grant extension even for good and sufficient reasons. In fact, it has been averred in the affidavit-in-opposition filed in the Trial Court on behalf of the Corporation that the time limit to comply with the norms of Retail Outlet Dealership are extended after careful consideration of the facts and circumstances of each case. The affidavit-in-reply filed in the Trial Court by Sarkar shows that he was making every effort to procure the site but for certain reasons he could not actually acquire the plot within the time limited. It appears from the affidavit" as well as from annexures thereto that he was negotiating for taking on lease a suitable site but the owner backed out and indicated that he was interested only in selling the land. The first extension was, therefore, asked for and allowed for a period of two months, that is, up to June 23, 1988. He entered into negotiations for purchase of a part of the land and gave an advance and "Land Ben Nama" was executed. Consent in writing was also obtained from the owner for lease of another portion of the land. However, the transaction could

not be finalised by registering the conveyance within the extended period of two months and, therefore, a further extension was requested and granted upto August 23, 1988. It would not be out of place to mention that Sarkar in fact procured the land and completed other formalities within the finally extended time limit as per the averments contained in his affidavit. In our opinion, therefore, neither the selection nor the Letter of Intent can be struck down on the ground aforesaid.

19. For the foregoing reasons, the appeals succeed and they are allowed. The judgment under appeal is set aside. The parties to bear their respective costs of appeals.

No separate order is required to be passed on the applications for interim relief which too stand disposed of in light of the foregoing order. Interim relief, if any, stands vacated.

An oral application for stay of the implementation and operation of this judgment made on behalf of the writ petitioner is rejected.

Shyamal Kumar Sen, J.

20. I agree.

21. Appeals allowed.