

(1993) 10 MP CK 0009

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1995 of 1985

Chinta Jaiswal

APPELLANT

Vs

Indian Oil Corporation Ltd. and Others

RESPONDENT

Date of Decision : 14-10-1993

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1993) ILR (MP) 489 : (1994) 39 MPLJ 777 : (1994) MPLJ 777

Hon'ble Judges : R.C. Lahoti, J;M.V. Tamaskar, J

Bench : Division Bench

Advocate : M.L. Jaiswal, for the Appellant; J.P. Sanghi, and Y.S. Dharmadhikari, for the Respondent

Final Decision : Allowed

Judgement

M.V. Tamaskar, J.

This petition is directed against an order appointing respondent No. 3 as Dealer and Distributor of L.P.G. Agency by Indian Oil Corporation, respondent No. 1.

The controversy arose in the following circumstances : an advertisement (Annexure AI) was issued calling upon unemployed Graduates to make applications in the form and the conditions mentioned therein by a certain date. The eligibility conditions, as given, were that a person should be an Indian citizen, that he should be 21 years of age and not more than 35 years on the date of application, that he should be a graduate of a University and that he should be a resident of the same district and should be a member of a family whose annual income is not more than 24,000.00. This application was required to be filed along with an affidavit disclosing full particulars.

In all 29 applications were received including that of the petitioner and that of respondent No. 3 Padampat Garg, out of which 23 persons were called for interview by the Oil Selection Board (hereinafter referred to as the Board), at Raipur. The Board placed respondent No. 3 at S. No. 1 and the petitioner at S.

No. 2. On being selected, a letter of intent was issued by respondent No. 1 in favour of respondent No. 3 for complying with certain conditions in respect of establishment of the gas agency, store and other facilities.

Respondent No. 3, in his affidavit, stated that he was employed with his maternal uncle Natthulal Goyal. The petitioner had also submitted an application giving full particulars that she was a graduate from Awadhesh Pratap Singh University, Rewa and was unemployed and that her husband, at the relevant time, had met with an accident and was a handicapped person who voluntarily retired on 25-2-1983.

The applications submitted were processed by the Board on the basis of the information furnished.

As per return filed by respondent No. 1, if any information was found to be wrong, the application of the applicant was liable to be rejected.

The petitioner challenges the appointment of respondent No. 3 on the ground that respondent No. 3 was gainfully employed as he was having an independent business in the name and style of "Padam Textile Agency" at Satna of which he was the sole proprietor. It was also stated that he had current Bank Account bearing No. 26078 in the Union Bank of India, Satna. It was also stated that he was member of the Textile Merchants' Association. Further, it was stated that the petitioner had sufficient land for construction of a godown providing for other facilities as the service centre, whereas respondent No. 3 had no such arrangement.

Learned counsel for respondent No. 3 submitted that he was not employed, that "Padam Textile Agency" did not belong to him as he was merely lending his name for business of his maternal uncle Natthulal Goyal, that he was getting some salary from his maternal uncle, that the service was merely temporary and as such, it cannot be said that he was gainfully employed within the meaning of the word "employed" for purposes of consideration of appointment as distributor of L.P.G. at Satna. It was also submitted that the Board had applied its mind to the cases of both the petitioner and respondent No. 3 and as such, the selection made by the Board cannot be scrutinised by this Court and the selection should be accepted on the ground that it is headed by a High Court Judge and other independent Officers.

Counsel for the petitioner strenuously submitted that the Indian Oil Corporation is a State within the meaning of Article 12 of the Constitution of India and it is expected to act reasonably and any action done which does not conform to the test of reasonableness, the Court would be justified to look into the grievance made by the petitioner.

There cannot be any doubt that the Indian Oil Corporation is amenable to the jurisdiction of this Court under Article 226 of the Constitution. See Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

The question for consideration, therefore, is whether this Court can look into the circumstances which do point out that respondent No. 3 lacked initial eligibility and could not be considered for being appointed as Dealer or Distributor and secondly whether the selection made by the Board is final.

Learned counsel for respondent No. 1 submitted that the Board consists of High Dignitaries and Experts and was not supposed to give reasons for the selection made and this Court cannot sit as if in appeal over the merits considered in respect of each of the candidates. The list prepared by the Board is, therefore, not liable to be revised or set aside by this Court. He relied on a judgment of Calcutta High Court in Barun Kumar Bose v. Shiba Prasad Bhakat, C. R. No. 8423/84, Calcutta.

Before we embark upon the scrutiny of the material placed by the petitioner and the respondent, it will be useful to consider as to what is meant by "employed". Essentially, the scheme appears to be for persons who are educated unemployed as contained in the advertisement (Annexure A1) at the top. Thus what is to be seen is whether in the facts and circumstances of the case, respondent No. 3 was "unemployed."

The "educated unemployed" including the "Engineering Graduates" were eligible for making an application under this advertisement. Whether the word "unemployed" means a person who is not employed in any service, much so in permanent service or would it also include -a person who though is self employed, as for instance in the present case having a business of his own, or working for some businessman either as an Agent or servant, would also be a person covered within the meaning of the words "Educated Unemployed" or does it only mean a regular service either under the State Government, Central Government or any Corporation, or as ordinarily understood in "service" in common parlance?

For purposes of a person to be known as "employed" it is necessary that he should be in employment of someone, and secondly, that it should be a gainful employment. Gainful employment would ordinarily mean that a person is able to earn his livelihood for maintenance of his family. If the said appointment is not gainful, but simply because a person has no employment and is serving somewhere on a salary which cannot be said to be commensurate with the work he is doing and is also getting reward for his service just like a bare subsistence, could it be said that a person is employed?

In cases of self employed person, if he is running a business having sufficient turnover, it could be said that he is self employed. For this purpose, a reference may be made to Stroud's Judicial Dictionary, 4th Edition, Volume 2, at page 894 wherein certain examples have been given as under :-

"(b) "employed person., gainfully occupied in employment., under a contract of service" (National Insurance Acts, 1946 (c.67) section 1(2)(a) and 1965 (c) 51, Section 1(2) (a). A person whose expenses exceeded his remuneration was held

to be an "employed person" *Vandyk v. Minister of Pensions and National Insurance* (1955) 1 Q.B. 29. An articulated clerk who received no wages but was given presents of money from time to time was "gainfully occupied" under a "contract of service" and therefore, an "employed person" *Benjamin v. Minister of Pensions and National Insurance* (1960) 2 Q.B. 519. Two articulated clerks who received no remuneration, but had the cost of their lunches and travel reimbursed were held to be "gainfully occupied" and "employed persons" *Re J.B. Griffiths Quinn and Co.* 5 K.I.R. 128. A married woman intermittently engaged on market research at a fixed fee for each occasion was held to be an "employed" person *Market Investigations v. Minister of Social Security* (1969) 2 W.L.R. 1.

"Self employed persons" (National Insurance Act, 1965 (c. 51), Section 1(2)(b). A music hall artist was held to be employed under a contract for service and not a "contract of service" and was, therefore, a self-employed person *Gould v. Minister of National Insurance* 1951 1 K. B. 731. But see *Stagecraft v. Minister of National Insurance*, *infra*. A sales representative paid by commission only, and no expenses" is a "self employed" person *Willy Scheldegger Swiss Typewriting School v. Minister of Social Security* (1968) 5 K.I.R. 65, and see *EMPLOYEE*. As also is a person who contracts to carry concrete in a vehicle provided by himself, even if he is compelled to use the uniform and colours of the manufacturers, and work to their orders *Ready Mixed Concrete v. Minister of Pensions and National Insurance* (1968) 2 Q.B. 497. As also is a professional actor who teaches part time at a school of drama *Argent v. Minister of Social Security* (1968) 1 W.L.R. 1749".

A reading of the above cases discloses that a person can be held to be employed in various categories, that is to say, in a contract of service or as an articulated clerk receiving remuneration or engaged in market as agent or an artist having a contract of service, being self employed etc.

Now the question for consideration in the instant case is whether respondent No. 3 who was, at the relevant time when the application was made, the sole proprietor of the firm known as Padam Textile Agency which had a bank account in its name and capacity as a proprietor of the said firm, was member of the Textile Association, Satna.

It was further submitted by the counsel for the petitioner that the fact that he was the Proprietor of Padam Textile Agency, was not disclosed in his affidavit filed along with the application. As such, the material which was placed before the Board was incomplete and on the mere statement of respondent No. 3 in the affidavit that he was working with his maternal uncle, he was treated as unemployed.

The petitioner has substantiated her allegations by filing documents whereby the orders placed by Padam Textile Agency are placed on record. The Bank ledger in the name of respondent No. 3 of Padam Textile Agency has also been filed on record. These allegations surprisingly, have not been rebutted either by

respondent No. 1 or respondent No. 2. On the other hand, respondent No. 1 has said that if any information has been wrongly given, the candidate would be disqualified.

Respondent No. 3, on the other hand, filed an affidavit of his maternal uncle Shri Natthulal Goyal saying that he is the proprietor of the firm M/s Padam Textile Agency, Jai Stambh Chowk, Satna and that respondent No. 3 was merely a benami and as such, it should not be taken that he has any business of his own. However, this affidavit was not before the Board. The other material which has been placed by the petitioner and regarding which complaint was made vide Annexure D of respondent No. 1 giving full details regarding respondent No. 3 being proprietor of the firm having account and dealings, was not considered and replied by respondent No. 1 and it is only in the petition that they have come forward with the submission that the selection made by the Board was on the basis of the information supplied and should be accepted as the Board cannot be said to be biased on any account.

The whole material which has been placed before this Court by the respondents goes to show that respondent No. 3 was working for Padam Textile Agency, that he was getting salary, that there was a bank account in his name which was solely operated by him. However, all these facts do go to show that respondent No. 3 was either self employed, i.e. engaged in business in the name and style of Padam Textile Agency, or on the other hand, a person having an employment getting salary. The respondent No. 3 himself has placed on record the account showing that he was paid salary of Rs. 3,300.00 vide Annexure E at page 3.

Now the difficulty in the present case is that all these matters, not being before the Board, the Board had no opportunity of considering whether respondent No. 3 was employed or deemed to have been employed as contemplated in the Advertisement.

Whether it is a case of self employment or employment, the matter had to be placed before the Board. Respondent No. 3 having not disclosed full facts and suppressed the same consideration of his application by the Board appears to be not in conformity with the eligibility requirement as stated in the advertisement. No doubt that the Board considered both the petitioner as well as respondent No. 3, but the question is whether the consideration of the application by the Board can be said to be lawful. If full facts would have been placed before the Board, naturally the consideration of application of respondent No. 3 would have been different. Consideration of a person who was not entitled, has prejudiced the case of the petitioner also. In this view of the matter, the allotment of agency for distribution of the L.P.G. in favour of respondent No. 3 by respondent No. 1 cannot be said to be beyond the scope of scrutiny by this Court.

Where a material condition is omitted, for consideration, the whole consideration becomes bad. It is unfortunate that after the selection was made in the year 1985 and even when the representation was made, Respondent No. 1 did not

think it proper to scrutinise the representation which gave volumes of details. This petition has remained pending for 8 years before this Court. A person who was ineligible to get the agency on the basis of the eligibility criteria, has been awarded the agency and who in turn has spent at least Rs. 1.5 lacs for establishment of the agency and other requirements.

We are not entering into any of the reasons, nor do we say that the Board was required to give reasons for any selection. No material considered by the Board has been placed before this Court. Therefore, we are only left with the averments made in the petition and the return. In the return, there has been no denial of the contentions raised by the petitioner and impliedly it can be said that the said submissions are in fact admitted.

In this view of the matter, the order dated 9-4-1985, appointing respondent No. 3 as Dealer, cannot but be set aside. Accordingly we hereby quash the said order and further direct that respondent No. 1 shall issue a fresh advertisement considering the application of the petitioner as well as those of others which may be received, within a period of three months. However, respondent No. 3 shall not be eligible to make any application in view of the suppression of facts by him and getting selected because of his cunningness.

The petition thus succeeds and is allowed with costs Rs. 200.00. Security amount, if deposited, be refunded to the petitioner.