
(1997) 02 CAL CK 0040
In the Calcutta High Court
Case No : C.O. No. 9174 (W) of 1996

Debasis Dhabal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-02-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 17
Motor Vehicles Act, 1939 — Section 47(1H)

Citation : AIR 1997 Cal 296 : (1997) 2 CALLT 187

Hon'ble Judges : Samresh Banerjee, J

Bench : Single Bench

Advocate : Mrs. Chameli Majumdar, for the Appellant; Sibdas Banerjee, H.K. Lahiri, P.K. Ghosh, Tarafdar and Dipankar Dutta, for the Respondent

Judgement

1. The legality and the validity of the selection Board for the purpose held by the Oil Selection Board for the purpose of awarding L.P.G. distributorship in favour of the respondent No.6 in exclusion of the present petitioner is the subject-matter of challenge in the instant writ petition.

2. Such challenge has been made by the petitioner mainly on the ground that the respondent No.6 has been selected although he does not fulfil the eligibility criteria as laid down in the notice inviting applications dated 30th September, 1995; the provision for giving preference to the candidates who are unemployed graduates like the petitioner has not been given effect to by the respondents and unequals have been treated as equals and at the time of selection, all the materials and relevant criterion were not taken into consideration for the purpose of such selection by the Selection Board to the serious prejudice of the petitioner.

3. A notice issued by the Indian Oil Corporation and inviting application from the intending candidates for the selection of distributorship was published in the Ananda Bazar Patrika dated September 30, 1995. The said notice indicated the different eligibilities which candidate must possess. One of such eligibility clauses

was that income of the family (as described in the application form) for the last financial year must not exceed Rs.50,000/-. Clause 3(Kha) of the said notice also stated that in case of other things being equal amongst the candidates, unemployed graduate will be given preference and Consumer Co-operative Society will be preferred to unemployed graduate, it was further indicated in the said notice that the eligible candidates will be called for interview.

4. The petitioner who claims to be in possession of all the eligibilities as indicated in the aforesaid notice and also is an unemployed science graduate applied for such distributorship in the prescribed form along with others.

5. The petitioner thereafter was asked by the Selection Board to appear in the interview, as allegedly he fulfilled all the eligibility criteria as mentioned in the said notice as well as the application form supplied by the Indian Oil Corporation Authority.

6. It is the grievance of the petitioner that although he is the most eligible candidates having the most suitable place for a godown as asked for in the application form itself, possess all the eligibilities, and is a good sportsman and also is an unemployed graduate, it came to be known subsequently that the respondent No.6 has been selected in exclusion of the petitioner.

7. It is the specific contention of the petitioner that the impugned selection process was wholly unfair, illegal and in violation of Article No. 6 could not have been selected by the respondents as the income of his family for the last financial year exceeds more than Rs.50,000/-. It has specifically been pleaded in the writ petition that the respondent No.6 is a reputed businessman in Bankura; apart from having a transport business he has a business of retail shop of medicine, ice-cream factory and husking mill. That apart he has different types of family business in Durgapur, Asansol and Bankura and the total income of the petitioner and his family out of such business far exceeds Rs.50,000/- annually. It is also the specific contention of the petitioner that the petitioner who is an unemployed graduate is entitled to be preferred to the respondent No. 6 who is not unemployed graduate. it is the further case of the petitioner that the respondent No.6 also could not have been selected because he admittedly did not own or possess any suitable plot or land at the time when he applied for such distributorship or at the time of interview and such fact will be apparent from the transaction entered into by respondent No.6 with one Sri Jitendra Pal in respect of plot of land for the purpose of constructing such godown which is again according to the petitioner is far less suitable than that of the petitioner. It has also been specifically pleaded by the petitioner in the writ petition that it will appear from a copy of a Sale Deed in respect of said plot of land purchased by respondent No. 6 (Annexure "F") that respondent No.6 is a businessman by occupation and, therefore, such businessman by occupation could not have been selected by the respondents in exclusion of the petitioner who is an unemployed graduate as under the condition of the said notice for grant of L.P.G. Distributorship the petitioner is liable to be preferred to such a candidate. It is

the specific contention of the petitioner that respondent No. 6 who thus was even ineligible to apply and did not have any suitable location for construction of godown as required under the terms and conditions of appointment, has been selected by the respondent arbitrarily and mala fide.

8. The Oil Selection Board being the respondent Nos. 2 and 3 in their affidavit-in-opposition has stated, inter alia, that pursuant to the notice inviting applications 116 candidates were found eligible for consideration of interview out of which ultimately 81 candidates appeared on the date of interview and as per the policy guidelines for selection of dealer (distributor) the members of the Oil Selection Board have assessed the performance of the candidates through the interview for the distributorship in question as per the criteria for allotment of marks applicable for (open) category. Out of total 100 marks, 30 marks is allotted for personality, business ability, salesmanship; 20 marks is for capacity to arrange finance and capability to provide facilities; 30 marks for full time working dealer and 20 marks for general assessment and extra-curricular activity. It is further stated in the affidavit that each member of the Board after interviewing the candidates as per his own judgment on the basis of performance of each candidate allotted marks separately and thereafter the average of the marks allotted by both the members in respect of each candidate was worked out and thereafter a panel was formed containing the name of each candidate in order of merit. On the basis of such interview, respondent No. 6 secured first position in the panel securing 37 marks and one Mill Sonali Chakraborty secured second position in the panel securing 32.5 marks and their names were sent to the Oil Company by the said Board and on the basis of such recommendation the letter of intent was issued to respondent No.6 securing first position in the panel. It is also the specific case of the said respondents that from the income statement dated 6th March, 1996, furnished by the petitioner, the annual income of the family was found to be Rs. 40,270/- and not above Rs. 50,000/-. It is the further case of the respondents that under the present guidelines which has been followed in the matter of such selection, there is no scope or system for inspecting or examining the site offered by the respective candidates. It has been specifically pleaded by the Selection Board that selection was made fairly on the basis of available material and respondent No. 6 was found to be eligible and the petitioner could not be selected as his performance in the interview was poor. It is also specifically denied that the petitioner being unemployed graduate is to be preferred to the respondent No. 6 and it is contended that as per policy guidelines until and unless "other things being equal" criteria is fulfilled, no such preference can be given.

9. Respondent No. 6 in his affidavit-in-opposition has specifically denied that he was not eligible or his family income for the last financial year exceeded Rs. 50,000/-. He has also denied that he is a reputed businessman or he has a business of retail shop of medicine, ice-cream factory, husking mill, transport and other types of family business. It has been pleaded in the said affidavit by respondent No. 6 that his father is the owner of the retail shop of medicine

whereas his uncle (Sri Anilkrishna Biswas elder brother of his father) is the owner of a husking mill and his aunt Smt. Chayarani Biswas (his father's younger brother's wife) is the owner of Ice-cream factory, but his aforesaid uncle and aunt maintain separate mess and are living separately with their respective family members and they are not part of the family of petitioner which comprises of his father, mother and his younger brother. It is, however, admitted by respondent No. 6 in the said affidavit that he was engaged in transport business but has asserted that after having suffered substantial loss he withdrew himself from such business. It is further specifically pleaded by respondent No. 6 that he produced before the Oil Selection Board at the time of interview a certificate from Chartered Accountant in support of his income of his father from the business of retail medicine shop which does not exceed Rs. 50,000/-. As to the declaration made in the recital of the aforesaid Sale Deed by the petitioner that he is a businessman by occupation it has been contended that since the aforesaid plot of land was purchased after the letter of intent was issued by the Oil Company in favour of the petitioner and he intended to purchase the plot for the purpose of carrying on such business, he rightly described himself as a businessman in the said such Sale Deed which in any event cannot be a disqualification. It has also been contended that the petitioner is entitled to be preferred being unemployed graduate only if other things became equal between the two candidates, which did not happen in the instant case.

10. The petitioner in his affidavit-in-reply has specifically given the registration number of the two Buses owned by respondent No. 6 with which he was carrying on the business of carrying passengers. It has been further contended, inter alia, that even if the said two buses were sold out, the sale proceeds of the same would certainly exceed Rs. 50,000/-. The respondent No. 6 has filed a supplementary affidavit affirmed on 14th August, 1996 annexing a certificate of the Pradhan of Patrasayar Gram Panchayat certifying that apart from the business of medicine shop the father of respondent No. 6 does not have any other business; another certificate by such Pradhan certifying that the petitioner is unemployed and dependent on income of his father; a certificate by a Chartered Accountant certifying, inter alia, that the income from the retail trading of medicine of the father of respondent No. 6 Sri Sunil Kumar Biswas during the financial year 1994-95 was Rs. 45,000/-. He has also annexed in the said supplementary affidavit an agreement dated 20th April 1995 entered into between respondent No. 6 and one Md. Joynal Haque by which it was, inter alia, agreed by the parties that 50% share of respondent No. 6, in the Bus bearing Registration No. WB--41-2486 was agreed to be purchased by the said Md. Joynal Haque for a sum of Rs. 1 lakh which would be paid to the petitioner by a Bank Draft within 31st July, 1995. A copy of affidavit dated 12th August, 1996 affirmed by one Jahangir Middya has also been annexed wherein it has been stated that the Bus No. WB--41-3447 owned by respondent No. 6 and Md. Joynal Abedin has been purchased by him on 2nd January, 1995. Specific averment has also been made in the said supplementary affidavit as regard sale of the share of

the petitioner in respect of the two vehicles in the manner aforesaid.

11. In the case of a challenge of such selection, it is now well settled that the scope of judicial review is limited as it is not for the writ Court to sit as a Court of appeal over the decision of the Selection Board or to reassess the respective merits of the candidates or to substitute its own finding for that of the Selection Board. But at the same time the writ Court may interfere if the process of selection is arbitrary or mala fide or in violation of prescribed rules and regulations.

12. While not disputing the proposition that it is not for the writ Court to sit as a Court of Appeal over the decision of the Selection Board or to reassess the respective merits of the candidates or to substitute its own satisfaction for that of Selection Board, the learned Counsel appearing for the petitioner has submitted, inter alia, that this is a fit case requiring interference by the writ Court as the very selection process has been vitiated because of arbitrariness of selection inasmuch as an ineligible candidate namely the respondent No. 6 has been selected. It has been submitted, inter alia, on behalf of the petitioner, the relevant materials and the affidavit placed before the Court will indicate that the income of respondent No. 6 and his family certainly was an excess of Rs. 50,000/- and such fact including the fact that the petitioner is not at all unemployed but is a businessman was totally suppressed by the said candidate and he obtained the appointment by making misrepresentation that his income is below Rs. 50,000/- annually although it really exceeds the same and accordingly the selection of respondent No. 6 is vitiated as he was not even eligible to apply.

13. The learned Counsel appearing for the Oil Selection Board has submitted, inter alia, on the other hand that at the selection of such candidates, the Oil Selection Board for the purpose of considering the eligibility of the candidates including his eligibility as to his annual income has to act on the basis of documents furnished by the candidate and affidavit affirmed before the Board and it is not possible for the Board to investigate the authenticity or otherwise of the statements made by each of the candidate in respect of his aforesaid eligibility and the authenticity of documents placed before the Board. It has been contended since the statement made by respondent No. 6 and the documents disclosed in support of the same appeal to be alright which indicate his annual income was below Rs. 50,000/- he was found eligible.

14. The learned Counsel appearing for respondent No. 6 has submitted, inter alia, that the statement as to the actual annual income of respondent No. 6 are questions of facts which should not be gone into by the writ Court particularly when the allegation made by the petitioner have been denied and disputed. It has been further submitted that since the statement made before the Oil Selection Board indicate that the income of the petitioner is below Rs. 50,000/- but the petitioner is alleging that the same exceeds Rs. 50,000/-, the burden is on the petitioner to establish the same, which the petitioner has failed to discharge inasmuch as allegation made in the writ petition are absolutely vague

and lack in material particulars and, therefore, such complaint of the petitioner should not be taken cognizance of by the writ Court. It has also been submitted that in case of the present nature it is now well settled that the writ Court should not delve deep in the records of the Oil Selection Board for the purpose of finding out who is the fittest candidate according to the writ Court.

15. It is no doubt true that the Court will not certainly take serious note of any vague allegation in respect of the ineligibility of a candidate for his annual income exceeding Rs. 50,000/- and it is not for the writ Court to go into disputed questions of fact.

16. But it is also not to be overlooked that in the application form as also the declaration which is required to be made by a candidate relating to statements as to his different eligibilities, it is also required to be declared specifically that in the event of any incorrect, false or untrue statement, it will be open to Oil Companies not to issue intent or even to withdrawn the same after issuing the intent.

17. Under such circumstances if in the matter of such selection if it is brought to the notice of the Court that a candidate has been selected in exclusion of others although he was not all eligible and appointment has been obtained by the said appointee by making incorrect or wrong statement and by misrepresentation and by practising fraud, in my view, the entire process of selection will be vitiated and the Court may interfere in a fit and proper case.

18. If the Selection Board selects the candidate considering him to be eligible to apply on the basis of such misrepresentation of the fact as to his eligibility, the same in my view, would amount to an error of jurisdictional fact and the same will vitiate the entire process of selection there being error of "jurisdictional fact" at the time of selecting such a candidate inasmuch as no candidate can be selected by the Selection Board and be appointed by the Oil Companies unless and until he possesses the eligibilities indicated in the advertisement to apply for the distributorship.

19. As held by the Supreme Court in the case of Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, following the earlier decision of the Supreme Court in the case of Shiv Chander Kapoor, reported in , that a jurisdictional fact is one of the existence and non-existence on which depends assumption or refusal to assume jurisdiction by a Court, Tribunal or an authority. In Blacks Legal Dictionary it has been explained as the fact which must exist before the Court to properly assume jurisdiction of a particular case. Mistake of fact in relation of jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject-matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends, the Court or Tribunal exercises the jurisdiction, then the order is vitiated and error of "jurisdictional fact renders the order ultra vires and bad (Wade Administrative Law)". Such principle as laid down by the Supreme Court will also be very much

applicable in the case of present nature for selection which is made by the Oil Selection Board. When the Oil Companies invites application for grant of such distributorship and indicates specific eligibility of a candidate to apply, the existence of such eligibility of a candidate is the sine qua non for consideration and selection of such a candidate by the Oil Selection Board and appointed by the Oil Company. If the candidate concerned does not possess the eligibility at all, he has got no right to be considered for selection for an appointment. Therefore, if in a given case if a candidate applies for consideration of such selection for an appointment, although he does not possess the requisite eligibility, by making misrepresentation as to the fact of eligibility and relying on such misrepresentation the Oil Selection Board selects him and the Oil Companies give him the appointment, the entire process of selection and appointment is vitiated because of such error of jurisdictional fact in the matter of such selection of an appointment. In such a situation the Court can certainly interfere if on examination of proper materials the Court finds that such misrepresentation is made for getting a benefit by a candidate wilfully as the same also clearly amounts to practising of fraud upon the Oil Selection Board for the purpose of getting the selection in question. As held by the Supreme Court in the aforesaid case of *Shrisht Dhawan v. M/s. Shaw Brothers* (supra) at page 1564 (of AIR):--

"Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi Likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to "wing me into the easy-hearted man and trap him into snares". It has been defined as an act of trickery or deceit. In Webster fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Oxford, it has been defined as criminal deception, use of false representations to gain unjust advantage; dishonest artifice or trick. According to, Halsbury's Laws of England, a representation is deemed to have been false, and therefore, a misrepresentation, if it was at the material date false in substance and in fact Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case *Derry v. Peek* (1889) 14 App Cas 337 what constitutes fraud was described thus;

"fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without believe in its truth, or (3) recklessly, careless whether it be true or false."

It has been further held by the Supreme Court in the said case :

"The colour of fraud in public law or administrative law, as it is developing, is assuming different shade. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised."

20. In the instant case the writ petitioner has made specific allegation that the annual income of the petitioner and his family far exceeds Rs.50,000/- as the petitioner and his father are the owner of several businesses including a transport business and in fact the petitioner himself in the deed of sale in respect of the plot of land which he purchased after issue of letter of intent has described himself as a businessman although he declared himself to be unemployed before the Oil Selection Board and totally dependent on the income of his father.

21. The allegations made in respect thereof in the writ petition cannot be said to be vague inasmuch as the exact nature of business, like transport business, medicine shop and husking mill, ice-cream manufacturing business have been specifically indicated in the writ petition. In fact the respondent No.6 has not denied the existence of such businesses at all, but his case is that his family consist of his parents, himself and his younger brother and his father owns only the medicine business and the other businesses namely the husking mill, ice-cream manufacturing business are owned by his uncle and aunt who are living separately in separate premises and, therefore, they are not members of the family.

22. As regards the transport business also the petitioners has given not only the registration number of the two vehicles, but also the route in which the same were operative. Respondent No.6 in the affidavit-in-opposition has not denied that he was engaged in transport business, but has alleged that having suffered substantial loss in such business he withdrew himself from the business much prior to the date of publication of the advertisement being Annexure "A" hereto. After the petitioner gave registration number of the two buses owned by the petitioner and the route in which the said two buses were operating in the supplementary affidavit, the respondent No. 6 did not deny that he was the owner of the two buses although he has asserted that he was the co-owner of the aforesaid two buses with other persons and sold out his share to other persons annexing documents in respect thereof.

23. So far as the bus bearing Registration No. WB--41/3447 is concerned, the respondent No. 6 has not annexed the documents of sale in respect thereof, but

has annexed an affidavit by the purchaser of the said bus wherein it has been stated that the aforesaid bus has been purchased by them from respondent No. 6 and his co-sharer Md.Joynal Abedin on 2nd January, 1995. But the amount of consideration paid for such sale has not been disclosed in the said affidavit, although admittedly the respondent No. 6 now appears to have been engaged in transport business during the relevant financial year. He also has not disclosed even before this Court the amount which he received for sale of the aforesaid Bus No. WB--41/3447 which appears to have been sold out on 2nd January, 1995 although it was within the special knowledge of the respondent No. 6. As to the other vehicle namely the Bus bearing Registration No. WB--41/2486 it appears from copy of deed of an agreement entered into by respondent No. 6 with his co-sharer that his 50% share was sold on consideration of Rs. 1 lakh. It appears from the endorsement made on the reverse side of the first page of the said agreement that he received the amount on 8th September, 1995.

24. The respondent No. 6 has sought to contend that although he was engaged in transport business long before the issue of the advertisement he sold out the aforesaid buses in the manner stated above. But whether the respondent No. 6 sold out the said two buses before issue of the advertisement is wholly immaterial. The advertisement was issued in September, 1995. But the relevant period admittedly was the financial year from 1st of April, 1994 to 31st March, 1995 inasmuch as in the said advertisement it was clearly stated that the family income shall not exceed Rs.50,000/- in the last financial year. In the said financial year of 1994-95, the respondent No. 6 was admittedly engaged in the transport business and received the sale proceeds of the said bus bearing Registration No. WB--41/3447 on 2nd January, 1995 and even in the financial year following that is 1995-96 admittedly he obtained Rs. 1 lakh by selling the second vehicle. Under such circumstances there was no scope of the petitioner to declare before the Selection Board that he was unemployed and dependent on the income of his father which is a palpable incorrect and wrong statement. The respondent No.6 totally suppressed the facts before the Selection Board that he was not unemployed, but was very much engaged in the transport business in the relevant financial year. He also suppressed his income from the said business and sale proceeds of such bus received by him in the relevant financial year of 1994-95. Whether he suffered loss in the said business was wholly immaterial. Admittedly being engaged in the transport business in the relevant financial year it was incumbent on respondent No. 6 to disclose his income in the said financial year from the said business by producing him Income Tax return or any other authentic statement of his account in the said business. But the respondent No. 6 did not choose to do so.

25. Admittedly the income of the father according to respondent No. 6 in respect of the aforesaid financial year being Rs. 47,000/-, it is obvious such suppression was made by respondent No. 6 wilfully as disclosure of his income including such sale proceeds of the bus would have resulted in exceeding his family income more than Rs.50,000/-. The fact that the petitioner was a businessman and not

unemployed as sought to be represented by himself will further be evident from the deed of sale annexed to his affidavit-in-opposition in respect of land which he purchased for construction of godown. His occupation in the recital of the sale deed has been declared as a businessman. An attempt has been made to explain such statement by contending since by that time respondent No. 6 has received the letter of intent, he considered himself to be a businessman is hardly tenable and obviously is an afterthought. It will thus appear from the abovementioned facts that respondent No. 6 made a deliberate misrepresentation about his occupation and annual income by declaring himself to be unemployed and dependent on the income of his father and his annual income is below Rs.50,000/- wilfully with the motive to be selected and be appointed and thereby obtained the selection and appointment in his favour by practising fraud upon the Oil Selection Board and the Oil Company.

26. It is true, as submitted by the learned Counsel appearing for the Oil Selection Board that in the matter of considering the eligibility of a candidate relating to his income for the last financial year, the Board has to rely on the statement made in respect thereof and documents filed by him and if a candidate suppresses the real facts or makes misrepresentation about the same it is not possible for the Selection Board to know the same or to investigate into the correctness of statement made by a candidate.

27. But at the same time as admittedly it has been specifically stated in the application form as well as in the affidavit filed by each candidate that in the event the statement made by them are found to be incorrect or false, applications are liable to be rejected or even an intent may be withdrawn after issue of the same, in the event of challenge as to the correctness of such statement giving necessary particulars as to the eligibilities certainly it will be open to the Oil Company or even to the Board to investigate into the matter, specially in view of the fact the same will amount to error of jurisdictional fact and obtaining of advantage by practising fraud.

28. In the instant case a specific challenge having been thrown by the petitioner in the instant petition and from the affidavits of parties as it appears now that respondent No. 6 suppressed real fact in his, application and made misrepresentation about him income and his income is more than the prescribed limit in the relevant financial year, the respondent No. 6 certainly cannot be allowed to enjoy the fruit of such selection made by the Selection Board after having obtained the same by committing a fraud upon Oil Company and Oil Selection Board. The selection and appointment, therefore, is liable to be set aside.

29. The process of selection in my view has also become vitiated as it appears on examination or records that although extra-curricular activities is one of the relevant criteria for selection, the same has been clubbed together with general assessment and 20 marks have been allotted under the heading "general assessment and extra-curricular activities" without giving the break up of the

maximum marks and marks obtained under each of such heading. If the respondents have decided to select a candidate on the basis of awarding marks at interview under different heading and in such process extra-curricular activities of an applicant is a relevant consideration, separate marks is certainly required to be allotted for such extra-curricular activities and the same cannot be clubbed together with "general assessment" as the same are not ancillary to each other at all. If the same are clubbed together it will never be possible to ascertain what marks has been received by an applicant for extra-curricular activities and what marks under the heading "general assessment" resulting in the probability of arbitrariness in the matter of selection. For the same reason personality cannot be clubbed together with business ability and salesmanship not being ancillary to each other and is required to be evaluated separate awarding separate marks.

30. In fact in the instant case it appears that the present petitioner who claims proficiency in extra-curricular activities and produced relevant documents in respect thereof obtained only four marks under the heading "general assessment and extra-curricular activities " whereas the respondent No. 6 who has been selected by the Selection Board has also secured four marks under the same heading although does not appear to have any proficiency at all towards extra-curricular activities and did not possess any documents in respect thereof.

31. As it has been held by the Supreme Court in the case of * Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, following the earlier decision of the Supreme Court in the case of Shiv Chander Kapoor, reported in Shrisht Dhawan v. M/s. Shaw Brothers (supra) at page 1564 (of AIR) D.V. Bakshi and others etc. etc. Vs. Union of India and others, that when oral test is a must, a heavy responsibility is cast on the examiners to maintain a proper record of the oral test in respect of each candidate and marks must preferably be assigned under each head considered relevant to evaluate the candidate. Once this care is taken the element of subjectivity will be largely checked and the marks assigned under different heads at the oral test will more or less faithfully reflect the fitness of the candidate.

32. Admittedly in the instant case such a procedure has not been followed and in case of each candidate instead of assigning separate marks under the heading of "extra-curricular activities" the same and general assessment have been clubbed together as a result thereof the element of subjectivity and arbitrariness remain.

33. The learned Counsel appearing for respondent No. 6 has submitted relying on the decision of the Supreme Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, that it is not for the writ Court to sit as a Court of Appeal over the decision of the Selection Board by reapprising the evidence and the materials on record and to make a comparative assessment of merits of the respective candidates and a writ of certiorari can be issued only to correct error of law and not of fact. Reliance has also been placed in a Division Bench judgment of this Hon"ble Court in the case of Chinmoy Sarkar and etc. Vs. Md.

Shaniat Hossain and etc., in support of his contention that in case of such a selection by the Oil Selection Board, it is not for the writ Court to delve deep into the records of such Selection Board or the Oil Companies and to examine the validity of the rival claims upon the appreciation afresh of the materials of such records or on such reappraisal to find out whether selection is properly made or not.

34. While there cannot be any quarrel with the aforesaid principle of law relied upon by the petitioner, in the instant case the Court has examined the records of the Oil Selection Board not at all for the purpose of reappraising the evidence and thereafter to come to a decision who is the fittest candidate by making a comparative assessment of merits and demerits of the rival candidates or for the purpose of examining the validity of the claims of the rival candidate or for the purpose of sitting as a Court of Appeal over the aforesaid decision of the Selection Board.

35. Such records have been examined to find out whether the process of selection made by the Selection Board was fair and proper or arbitrary and whether relevant criteria were taken into consideration by such Selection Board for the purpose of selecting a candidate, as it is specifically alleged by the petitioner that such selection process was not fair and proper but arbitrary inasmuch as all relevant criteria were not taken into consideration by the Oil Selection Board and even an ineligible candidate has been selected.

36. In fact in the same Division Bench judgment of Chinmoy Sarkar v. Shaniat (supra) relied upon by respondent No. 6 it has been held by the Division Bench, inter alia, (paragraph 13) that if selection is vitiated by an arbitrary or irrational exercise of power or by mala fides 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.

37. Reliance has also been placed by the learned Advocate appearing for the respondent No. 6 in the decision of Supreme Court in the case of Bharat Singh and Others Vs. State of Haryana and Others, in support of his contention that the Court will not entertain a point of fact unless the evidence in respect thereof are annexed to the petition.

38. In the instant case however in the writ petition as also in the affidavits sufficient particulars have been given to show that the petitioner was not unemployed as claimed before the Oil Selection Board but was a businessman and his annual income exceeded Rs.50,000/- and in fact the petitioner himself has admitted about the ownership of the business of plying a stage carriage in a route although he has claimed that he was 50% owner of the said business and because of loss he sold out the bus. Under such circumstances the Court can hardly shut its eyes to obtaining of benefit by making misrepresentation of facts as to his eligibility although a candidate is liable to give all informations correctly.

39. It cannot be disputed that unless a candidate possess all the eligibilities he is not liable to be considered for grant of dealership and admittedly one of such eligibilities being that family income must not exceed Rs. 50,000/- per year and sufficient particulars being produced before the Court to show that the family income of the respondent No. 6 exceeded Rs. 50,000/- and therefore he was not even eligible to be considered, the Court certainly can enquire into the matter and cannot shut its eyes to the same as the very process of selection will be vitiated because of selection of a non-eligible candidate.

40. It appears that in the Manual of Selection of Dealers and Distributors which, inter alia, contains the policy on guidelines relating to such selection, it is not clearly indicated the procedure to be followed by the Oil Selection Board in the matter of selection of such candidates. It however appears from appendix to such Manual that there is a pro forma for awarding marks at the interview under the different heads under which such marking have to be made and the maximum marks under each heading and in the said pro forma "general assessment" and "extra-curricular activities" have been clubbed together which appears to have been followed by the Oil Selection Board.

41. The same however does not improve the position in any manner whatsoever inasmuch as in case of oral interview, marks are required to be awarded under each heading separately as pointed out hereinbefore and although in certain cases different criterions may be clubbed together if they are ancillary certainly the general assessment of a candidate and his extra-curricular activities cannot be said to be ancillary or co-related to each other and therefore the same cannot be clubbed together.

42. The complaint of the petitioner that the selection process has also been vitiated for non-implementation of the policy of giving preference to unemployed graduate also requires serious consideration.

43. In the advertisement it has been indicated, inter alia, that other things being equal, consumer Co-operative Societies will be given preference over unemployed graduates and the unemployed graduates will be given preference to other applicants. Since there was serious debate amongst the Counsels for the parties as to the meeting and interpretation of the aforesaid provision for giving preference to unemployed graduates and it is claimed by the petitioner that admittedly he being an unemployed graduate is entitled to be preferred to other applicants, this Court asked the learned Counsel appearing for the Oil Company to produce the relevant Government circular as referred to in the policy guideline contained in the Manual for selection of Dealers and Distributors (hereinafter referred to as the said Manual) on the basis of which such preference is sought to be made.

44. The learned Counsel appearing for the Oil Companies however was not able to produce the aforesaid Central Government order not being any possession in the same but the said Manual was produced before the Court and on examination

of the relevant provision of the said Manual containing the policy guideline for such selection, it appears to this Court that the preferential clause in the concerned advertisement was not correctly indicated in consonance with the aforesaid policy guideline. The relevant portions of clause 2.5 of the said Manual which deals with policy guideline for selection of dealers and distributors under the open category and with such preference, is quoted hereunder :--

"Corporations owned or controlled by the State Government and Consumer Co-operative Societies are also eligible. However, restrictions relating to Annual Income, Residence and Multiple Dealership would not be applicable to Corporations Owned or Controlled by State Government. Other things being equal :

Within this "OPEN" category, Consumer Co-operative Societies will be given preference over Unemployed Graduates/Unemployed Engineering Graduates. Unemployed Graduates/Unemployed Engineering Graduates will, however, be given preference over other applicants."

45. From the examination of such clause it appears that the restriction to the effect "other things being equal" not really apply in case of competition between Unemployed Graduates/Unemployed Engineering Graduates and other applicants but the same will apply only in case of competition between the Consumer Co-operative Societies and Unemployed Graduates, and such position is clear because of the use of the words "will however" in the second sentence relating to Unemployed Graduates/Unemployed Engineering Graduates.

46. In my view, careful reading of the aforesaid provision clearly indicates that while Consumer Co-operative Societies will be given preference over Unemployed Graduates/Unemployed Engineering Graduates, other things being equal, Unemployed Graduates/Unemployed Engineering Graduates will however be given preference over other applicants and in the later case is the restriction as to the "other things being equal" does not apply. Such position will be further clear from clause 2.7.8(ii) of the said policy guideline contained in the said manual where again it has been clarified that although other things being equal, Consumer Co-operative Societies will be given preference over Unemployed Graduates/Unemployed Engineering Graduates; but Unemployed Graduates/Unemployed Engineering Graduates will however be given preference over other applicants.

47. The aforesaid provision in the said Manual leaves no manner of doubts that even in case of open categories it is the policy of the respondents following the Central Government policy to give preference to the Unemployed Graduates and also to help the persons belonging to the lower income group so that they can become self-employed. Otherwise when admittedly to run a business of such distributorship or dealership substantial investment in necessary there could not have been any reason to treat only such candidates eligible whose family income does not exceed Rs. 50,000/- per year.

48. It is therefore the duty of Oil Companies and Oil Selection Board to act in such manner in the matter of such selection of a candidate, that such policy is implemented and not to act in derogation thereof.

49. Admittedly in the impugned selection process no preference or credit or precedence has been given to the candidates who are unemployed graduates including the present petitioner.

50. It is the specific submission of the Ld. Counsels appearing for all the respondents including those of the Oil Companies and Oil Selection Board that the question of giving such preference will only arise when other things will be equal amongst the rival candidates and as in the instant case the total marks obtained by the petitioner was less than the total marks obtained by the selected candidates, the question of giving any preference to the petitioner did not arise other things not being equal. The learned Counsel for the petitioner on the other hand contend that amongst all the eligible candidates, unemployed graduates are liable to be preferred and not when there is equality of marks obtained at the interview.

51. But as pointed out hereinbefore the very approach of the respondents in considering the candidature of unemployed graduate for selection is wholly erroneous and is against the aforesaid policy guideline as in case of the competition between an unemployed graduate and other applicants excluding Co-operative Societies the Unemployed Graduates are required to be given preference and the question of other things being equal does not arise.

52. But even assuming that such preference can be given to an unemployed graduates over other applicants only when other things are equal, how the aforesaid policy can at all be implemented in practice? It will appear from the different headings under which marks are awarded at the interview, by the Oil Selection Board, that business ability and salesmanship are also relevant criteria for taking into consideration in the matter of selection. Under such circumstances in a competition between candidates who are already employed in some business or sales and candidates who are unemployed graduates, the candidates are already engaged in business or in sales always will be in an advantageous position securing marks under such heading over the unemployed graduates who will not be able to secure any marks at all under such heading. The result will be in such a situation there will hardly be any probability of equality of marks of such candidates of the interview for which preference can ever be given to an unemployed graduates. On the contrary in such a situation unemployed graduate will always instead of being in a preferential position will be in a handicapped position and the candidates engaged in business or sale will be in a preferential position thereby defeating the very policy of the Government in the matter of such selection.

53. The learned Counsel appearing for all the respondents have relied on the decision of Supreme Court in the case of Sher Singh Vs. Union of India (UOI) and

Others, for the purpose of contending that expression "preference" signifies that other things being equal one will have preference before the others.

54. After considering the aforesaid decision, I am of the view, the aforesaid finding of the Supreme Court was arrived at in the context of the said case and not applicable in the instant case.

55. In the aforesaid case the Supreme Court was dealing with Section 47(1H) of the Motor Vehicles Act, 1939 which provided, inter alia, that in case of inter-State route the State Transport undertaking will have preference. After considering all aspects of the matter the Supreme Court was of the view, when an applicant for stage carriage permit is processed u/s 47 of the said Act the application of a State Transport undertaking for an inter-State route shall be examined as application for any other private operators and the merits and demerits must be ascertained keeping in view of requirement of clauses (a) to (f) of Section 47(1) of the said Act and after comparing the merits and demerits of both, not with the yardstick of mathematical accuracy State Transport Undertaking will have preference over others, all these things being equal. The Supreme Court was of the said view as it was held that unlike Chapter (IV-A), such an undertaking when applies for stage carriage permit under Chapter (IV) he has to enter into arena like any other applicants and not in exclusion of the private operators.

55.1 In the instant case as pointed out hereinbefore reading of the aforesaid guideline will clearly indicate that the very intention of the Central Government and the Oil Companies is to give preference to unemployed graduates and engineering graduates over other applicants even in open category and to help persons belonging to lower income group whose annual income does not exceed Rs.50,000/- to self-employ themselves. It is in the light of the aforesaid policy the meaning of "preference" has to be understood and interpreted and not independent of the same.

56. Admittedly the dictionary meaning of preference is precedence, prior right, advantage etc. As per Black's Law Dictionary 6th Edition, "to prefer" inter alia means to give advantage, priority or privilege. But what it will really signify in a particular case is to be decided under the facts and circumstances of the particular case. While in a given circumstances such preference can be given only when all other things become equal amongst the rival candidates, the same may also signify of giving advantage or a prior right or privilege over others. In the instant case, in my view, in the light of the aforesaid policy decision and the guideline it will signify of giving precedence or prior right or advantage to the graduate unemployed over others.

57. But even assuming that preference can be given only when all other things are equal, in view of the fact business experience and salesmanship has also been treated as relevant criteria to be taken into consideration for selecting a candidate which an unemployed graduate can hardly possess, the respondents

must follow a procedure for the purpose of giving an effective, real and purposeful meaning to such preferential clause for the purpose of implementing such policy guideline, which may be done at least by giving separate credit or marks in the matter of such selection for being an unemployed graduate. The Oil Companies and the Oil Selection Board therefore cannot act in a manner in the matter of such selection which will make such policy decision to give preference to unemployed graduates nugatory.

58. As in the instant case such policy of giving preference to the unemployed graduates has not been implemented in any manner whatsoever by the Oil Selection Board, the entire process of selection stands vitiated.

59. I am however unable to accept the submissions made on behalf of the petitioner that the respondent No. 6 could not have been selected as admittedly he did not possess the requisite site for godown at the time of interview. Clause of the application form clearly indicates that possession of such site at the time of interview is not a condition precedent of selection and appointment and the candidate may acquire such site subsequently although he may have to satisfy the authorities of his capability to acquire such site later.

60. But for the reasons stated above the selection of the respondent No. 6 and the entire selection process cannot be sustained and are liable to be quashed.

61. In the result the writ application succeeds and the same is hereby allowed. The selection and the appointment as a distributor of the respondent No. 6 made by the Oil Selection Board and the respondent No. 4 respectively as also the entire selection process for selecting a distributor pursuant to the advertisement issued by the Indian Oil Corporation Limited being Annexure "A" to the writ petition are hereby set aside and quashed. Let a writ in the nature of certiorari be issued accordingly.

62. Let a writ in the nature of mandamus be issued against the respondent Nos. 1 to 5 directing them to consider afresh within two months from the communication of this order the candidature for the impugned distributorship of all the candidates who applied pursuant to the impugned newspaper notification being Annexure "A" to the writ petition and who were called to interview being eligible to be considered except the present writ petitioner and to make the selection and the appointment amongst such candidates in accordance with law.

63. It is however made clear that such fresh consideration for the aforesaid selection of an appointment shall be made, inter alia, taking into consideration the eligibility of an applicant as to annual income for the relevant financial year referred to Annexure "A" to the writ petition being the financial year 1994-95. It is further made clear that such consideration for selection and appointment shall be made by the said respondents in the light of the present judgment by indicating the maximum marks allottable under each heading which is treated as a relevant criterion to be considered at the interview for selection and the actual marks obtained by each candidate separately under each heading and by also

giving real and purposeful effect to the preferential clause for the unemployed graduates/unemployed engineering graduates or the Co-operative Societies as the case may be in terms of the policy guideline indicated in the Manual and as interpreted in the present judgment.

64. It is further made clear that since the respondent No. 6 has been found to have obtained the impugned selection by making misrepresentation and practising fraud upon the Oil Selection Board and he has been found not to be possessing eligibility as to his income for the relevant financial year 1994-95, his annual family income exceeding Rs. 50,000/- per year, his case shall not be considered any further by the Oil Selection Board and the Oil Companies for such selection and appointment.

65. There will be no order as to costs.

66. Learned Advocate for the respondent No. 6 prays for stay of operation of this judgment. The prayer is considered and refused.

67. Application allowed.