
(1991) 04 BOM CK 0066

In the Bombay High Court

Case No : Writ Petition No's. 50 and 62 of 1991

Devanand Vishwanath Shirodkar

APPELLANT

Vs

State of Goa and Others

RESPONDENT

Date of Decision : 03-04-1991

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1991) 4 BomCR 358

Hon'ble Judges : M.S. Deshpande, J;E.S. Da'Silva, J

Bench : Division Bench

Advocate : V.B. Nadkarni and A.C. Navelkar, in W.P. 50/91, for the Appellant; H.R. Bharne, A.G.P. for respondent Nos. 1 and 2 in both W.P., S.K. Kakodkar and S.R. Rebello for respondent No. 3 in both W.P. 62/91, for the Respondent

Judgement

M.S. Deshpande, J.—The two petitioners in these writ petitions under Article 226 of the Constitution challenge the action of the respondent Nos. 1 and 2 of allotting a fair price shop to the respondent No. 3-Sumati Shambu Palyankar.

2. A notice was published by the respondent No. 1, inviting applications from educated unemployed for grant of a fair price shop. Devanand Shirodkar, petitioner in Writ Petition No. 50, of 1991, filed an application on October 4, 1990, for allotment of the shop, setting out his qualifications and also informing that he had been registered at the Regional Employment Exchange for four years and also indicated the premises where he proposed to set up the fair price shop. Original guide lines were laid down under the letter of the under Secretary dated 13th May, 1987, but the preference mentioned therein was modified and the class of educated unemployed was given first preference. The respondent No. 3 did not belong to the categories to which preference was to be given and belonged to the last residual category. She had been allotted a bakery licence as a widow of a freedom fighter. According to the petitioner, she had also three bar licenses-one in her own name, other in the name of her deceased husband and the third, in the name of her son. She is also receiving the pension as the widow

of a deceased freedom fighter and Ex-MLA. The petitioner's contention was that it was not legally open to the respondent Nos. 1 and 2 to depart from the criteria and the order of preference prescribed and to allot the fair price shop in an arbitrary manner to the respondent No. 3.

Devanand Malwankar, petitioner in Writ Petition No. 62 of 1991, contended that he had furnished with his application for the allotment of fair price shop, his bio-data and also offered to furnish subsequently the registration number in the Employment Exchange, and it was furnished later. Contending that he was also entitled to be considered for allotment of the fair price shop, because he belonged to the category of the educated unemployed, he also challenges the allotment of the shop to the respondent No. 3.

3. By the returns filed by the respondent Nos. 1 and 2, it was contended that the interested parties, including educated unemployed with reasonable business experience, were to apply for allotment of the fair price shop, but petitioner Shirodkar was ineligible as he was working as an apprentice, and as the respondent No. 3 was found more suitable, the shop came to be allotted to her. With regard to petitioner Malwankar, it was urged that he did not produce his employment registration details and he could not, therefore, be considered as an educated unemployed. Respondent Nos. 1 and 2 were not aware of the other activities of the respondent No. 3. Petitioner Malwankar filed a rejoinder contending that he had furnished his registration number on the rolls of the Employment Exchange, to the Civil Supplies Inspector of the Sub Station, and he was never told that his application could not be considered because it was incomplete.

4. There is no dispute that the guide lines issued by the respondent Nos. 1 and 2 prescribed the order of preference, and educated unemployed were to be preferred above all the other categories, and the respondent No. 3 did not belong to any of the preferred categories, though she was the widow of a freedom fighter, and freedom fighters' category was one of those which was in the order of preference but below the educated unemployed category.

5. Shri Kadodkar, learned Counsel for the respondent No. 3, contended that the guide lines dated March 15, 1988, were merely administrative instructions and would not bind the respondent Nos. 1 and 2, and they could not be equated with the standards or norms. The letter, dated 15th March, 1988, addressed by the Government to the Director of Civil Supplies and Price Control shows that the Government had modified the order of preference in allotment of fair price shops, and while the educated unemployed were at serial No. (a) in the guide lines, freedom fighters were at serial No. (e) and others at serial No. (g). Preference was to be given to educated unemployed trained under TRYSEM.

In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , it has been pointed out that the power or discretion of the Government in the matter of grant of larges including award of jobs, contracts quotas,

licences etc., must be confined and structured by rational, relevant and non discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principles which in itself was not irrational, unreasonable or discriminatory. Shri Kakodkar, however, urged that the guide lines cannot be equated with standards or norms as understood in Ramana's case, and relying on J.R. Raghupathy and Others Vs. State of A.P. and Others, , urged that the guide-lines issued by the State Government had no statutory force and they were merely in the nature of executive instructions for the guidance of the Collectors. There, on the basis of the guideline, the Collectors were asked to forward proposals for formation of Revenue Mandals and for location of Mandal Head-quarters. The proposals so forwarded by the Collectors were processed in the Secretariate in the light of the suggestions and objections received in response to the preliminary notification issued by the Government and then placed before a Cabinet Sub Committee. The Supreme Court, however, cited with approval the following passage from Durga Das Basu's Administrative Law, 2nd Edition, at page 145 :

"Even though a non-statutory rule, bye-law or instructions may be changed by the authority who made it, without any formality and it cannot ordinarily be enforced through a Court of law, the party aggrieved by its non-enforcement may, nevertheless, get relief under Article 226 of the Constitution where the practice would result in arbitrariness or absence of fair play or discrimination, particularly where the authority making such non-statutory rule or the like comes within the definition of "State" under Article 12".

In J.R. Ragupathy's case, the Supreme Court pointed out that the guide-lines there were merely in the nature of instructions issued by the State Government to the Collectors regulating the manner in which they should formulate their proposals for formation of a Revenue Mandal or for location of its Headquarters keeping in view the broad guidelines laid down in Appendix I to the White Paper, and were mere departmental instructions meant for the Collectors, which is not the case here. The observation in Foreshore Cooperative Housing Society Limited, Bombay v. Mivara Hakk Suraksha Samiti Bombay, (Judgments Today 1991(5) S.C. 126 are of no assistance to the respondents, because what was challenged there was not the violation of any statutory rule but only certain guidelines which were more or less broad policy considerations from which minor deviations were permissible if the circumstances justify the same. Obviously, these observations would not show that a total departure from the guidelines would be permissible. Nor are the observations in Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others, , of any assistance to the respondents. In para 64, it was observed that the power of discretion of the Government in the matter of grant of larges including award of jobs, contracts quotas, licences etc., must be confirmed and structure by rational, relevant and non discriminatory standard or norm and if the Government departed from such standard or norm in

any particular case or cases, the action of the Government would be liable to be struck down, unless it could be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, irrelevant, unreasonable or discriminatory. There, the Court found that there had been no deviations from the guidelines. In *M/s. G. J. Fernandez Vs. State of Karnataka and others*, , the questions arose about the interpretation of the Government guidelines, and the Court held that if a party had been consistently and bona fide interpreting the standard prescribed by it in a particular manner, the Court should not interfere though it may be inclined to read or construe the conditions differently. This is not to say that the Government is not bound by the guidelines prescribed by it. If the respondents wanted to depart from the order of preference, at least, there should have been some indication why they were departing from the preference, and this is not forthcoming either in the order of allotment or the returns filed by the respondents.

6. Petitioner Shriodkar did not mention in his petition that he was working as an apprentice. This was a stand taken in the return filed on behalf of the respondent No. 3. Petitioner Shriodkar stated in his rejoinder that he was registered as an apprentice in the trade of Mechanic Tractor in the Directorate of Agriculture, and it did not amount to employment. We should have expected a reference to this position in the petition, but merely because that disclosure was not made in the petition, we do not think that the petitioner can be said to have come it unclean hands. As pointed out in *The Employees' State Insurance Corporation and Another Vs. The Tata Engineering and Locomotive Co. Ltd. and Another*, , the heart of the matter in the apprenticeship is the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. That certain payment is made during the apprenticeships, by whatever name called, and that the apprentice has to be under certain rules of the discipline do not convert the apprentice to a regular employees under the employer. Such a person remains a learner and is not an employee. The submission of Shri Kakodkar was that these observations came to be made in the context of the provisions of the Employees' State Insurance Act, 1948, and are not of general application. But, this is not correct, because while dealing with the nature of relationship of master and servant, the Supreme Court took into consideration the position under the ordinary law. We have considered the terms of the apprenticeship agreement filed by the petitioner-Shirodkar and it is clear to us that petitioner Shriodkar could not be said to be an employee under that agreement. Shri Kakodkar, however, urged that the petitioners was to get more than Rs. 300/- as a stipend and could not, therefore, be said to be an indigent person who was not in receipt of any remuneration and, therefore, entitled to a preferential treatment under the guidelines. It is not possible to accept this contention, because even the order of preference does not enumerate only the categories of indigent person. There are several categories mentioned, but there is no reference to any restrictions on the basis of income. It is also

clear to us that the respondent No. 3 could not have been ignore because she had other licences, though the position that she had more than one licence has been denied. That was not a factor which was laid down in the guide lines. We are not inclined to decline a relief to the petitioner only because he had not referred to his apprenticeship agreement.

7. With regard to petitioner-Malwankar, it is apparent that he had not furnished his registration number in the Employment Exchange together with his application for allotment, and only vaguely stated in his rejoinder that he had submitted the number to the Civil Supplies Inspector Sub-Station, without furnishing the date and time when this was done, or the name of the Civil Supplies Inspector. This position was denied by the respondent Nos. 1 and 2 and we see from the copy of the report of the Mamlatdar also that petitioner-Malwankar had not furnished the requisite information. This was in relation to this eligibility, and we do not think that if the prima facie proof regarding his answering the essential condition were not furnished, he would be entitled to agitate that he had wrongly been left out of consideration. His petition, therefore, will have to be dismissed.

8. Reference was made on behalf of the respondent No. 3 to the notice published in the newspaper on 19-9-1990 by the Mamlatdar (Exhibit R-1), where it was mentioned that the applicant should have reasonable business experience and that he should be dealing in essential commodities other than those supplied by the Government through the public distribution system. There is no indication under what authority this press-note came to be issued, and if some additional requirement is mentioned in the press-note, apart from the guide-lines, that requirement cannot be regarded to have been essential. No plan was raised in the returns filed by the respondents that the business experience, or dealing in other essential commodities, was necessary, and in the absence of such a ground, the plea cannot be entertained, in view of the observations in S.S. Sharma and Others Vs. Union of India (UOI) and Others, , as oral submissions raising new points for the first time tend to grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response.

9. The learned Counsel for the petitioners rightly urged that there was non-application of mind on the part of the authorities in not showing due consideration to the requirements of the guide-lines allowing preference to educated unemployed. According to Shri Kakodkar, the contention regarding non application of mind and non-consideration of the guide lines should not be allowed to be raised, because there is no clear indication of the contention in the petitions. Shirodkar's petition, however, clearly raises a point that it was not legally open to the respondent Nos. 1 and 2 to depart from the criteria and the order of the preference prescribed by them and in an arbitrary manner allot the fair price shop to the respondent No. 3. The order purports to show that the only factor which weighed with the respondent Nos. 1 and 2 was that the respondent

No. 3 was more suitable than the others, without considering the preference to which the category of educated unemployed was entitled. The order of allotment of the fair price shop to the respondent No. 3 will, therefore, have to be quashed.

10. Shri Nadkarni, learned Counsel for the petitioner Shriodkar, however, fairly conceded that since there were more applicants than one and since it is for the authority concerned to make the allotment, though the petitioner had prayed that the fair price shop should be allotted to him, it would not be possible for us to make such an order and the matter shall have to be decided by the respondent Nos. 1 and 2, after taking into consideration the claims of the petitioner and the respondent No. 3, who might have been entitled to allotment of the fair price shop, keeping in view the question of preference as well as suitability, after giving reasons for the preference.

11. In the result, we make the rule absolute in Writ Petition No. 50 of 1991 by quashing the impugned decision of the respondent No. 1 and 2 to allot the fair price shop in Chapora-Arjuna to the respondent No. 3 and directing the respondent Nos. 1 and 2 to allot the same to such person who may be entitled under the guide-lines, with due consideration to the question of preference.

Rule in Writ Petition No. 62 of 1991 is discharged.

There will be no order as to the costs in either of the petitions.