

(1996) 12 OHC CK 0002
In the Orissa High Court
Case No : O.J.C. No. 3696 of 1996

Dr. Pradeep Rao

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-12-1996

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1997) 1 OLR 142

Hon'ble Judges : S.N. Phukan, C.J;A. Pasayat, J

Bench : Division Bench

Advocate : S.K. Mund, for the Appellant; A.G. and Additional Government Advocate for opp. party Nos. 1 to 3, G. Rath and S.K. Padhi for Opp. party No. 5 and R. Roy, L. Roy and A. Roy for opp. party No. 4, for the Respondent

Judgement

A. Pasayat, J.—Petitioner, in eminent homoeopathic doctor of the Stats, has filed this petition stated to be in public interest questioning decision of the State Government to purchase Single Plune Digital Cardiac Cathaterisation Lab for the S. C. B. Medical College Hospital from M/s. Siemens Ltd., (in short, "Siemens"), allegedly over-looking recommendations of the State Level Purchase Committee (in short, "SLPC") to purchase it from fv?/s. Philips Medical System India Ltd., (in short "Philips"). It is stated that quality of equipment for which order has been placed with Siemens is inferior to that offered by Philips, and in any event indicated determinative reason of lesser financial involvement is not factually correct.

2. A reference to the1 factual aspects with some details would be necessary.

On 23-2-1999 seated tenders were invited for supply of the equipment. . Three cocerns, namely. Philips, Siemens and M/s. WilmoGs. submitted their tenders. The sealed tenders were opened by Director of Medical Education and Training (in short, "DMET") and were-Scrutinised. On 23-11-1995 and 30-11-1995 the tender papers were placed before the Purchase Sub-Committee constituted by the State, The Health Department decided to avail opinion of experts from

outside (the State and for that purpose decision was taken to select experts. On 22-12-1995, meeting of the State Level Purchase Committee was held. Though three nominated experts from outside the State were to attend, only one namely. Dr. U. N. Kaul, Professor and Head of the Department of Cardiology, All India Institute of Medical Science (in short, "AIIMS") attended the meeting. The Committee inter alia decided as follows :

"It is, therefore, decided that since the Philips System of Cath, Lab is considered to be technically No. 1 and commercially being lower as compared with Siemens, the same may be purchased."

The above matters was examined by the State Government as it was decided to place the matter before another Committee to be constituted, in which at least two outside experts should be there. On 28-2-1996 and 29-2-1996 the Expert Committee consisting of the Secretary of Health Department, the DMET, Orissa and Professors and Heads of the Department of Cardiology of V. S. S. Medical College, Burla, and M. K. C. G. Medical College, Berhampur, and two Assistant Professors of Cardiology of S. C. B. Medical College, Cuttack met. The Committee found as follows :

"The SLPC in its meeting held on 22-12-1995 had made M/s, Philips Company technically T-1 and M/s. Siemens "Company technically T-2. We agree that Philips is T-1 and marginal/.superior to Siemens."

On 10-3-1996 the Technical Expert Committee consisting of four outside experts and a host of internal experts met to consider the question of purchase of Cardiac Cath. Lab. in the said meeting the Committee found as follows :

".....It is seen that Philips satisfies almost all tender specifications with M, R. C. Tube. Siemens Ltd. comes next."

However, the Government decided to place order with Siemens as its equipment was cheaper and maintenance cost of the equipment is cheaper. It was observed that Philips was only marginally superior to Siemens.

3. Petitioner's stand is that ignoring the opinion of several outside experts, the State Government took a decision to place order with Siemens, The Siemens equipment does not conform to general specifications at least in respect of four items including the X-ray tube which is a vital and important component of Cath. Lab. system. The X-ray tube offered by Siemens is of cheaper and inferior quality and did not conform to the specification and its cost is Rs. 11 lakhs. The tube offered by Philips was Rs. 22 lakhs. This has been taken to be a ground for deciding in favour of Siemens ignoring the fact that the tube offered by it was of inferior quality and the instrument which requires sophisticated components if consists of materials of inferior quality, it would certainly affect effective functioning.

4. On behalf of the Siemens, Mr. G. Hath, learned Sr. Counsel urged that the scope of interference with administrative decision is very limited. The High Court

does not sit as a Court of appeal, and it can only see whether the decision-making process has been vitiated, and is not concerned with the decision itself. It is submitted that Philips had submitted exorbitantly high rate, and on negotiation came down by nearly Rs. 70 lakhs from Its original offer. That itself is indicating of foul-play. Action of the DMET in convening the meeting after the decision was taken not to seek the views of outside experts is patently mala fide and motivated. In any event, it is submitted that the Government has taken all relevant aspects into consideration and therefore, its action cannot be questioned. It is emphatically urged that there is hardly anything to choose between Philips and Siemens, both of whom are internationally reputed concerns. It is not that Philips was given a clean-chit about the quality of its equipments and components. The outside expert who had suggested the name of Philips belonged to an institute which placed orders with Siemens when it needed an equipment. Even the outside experts had not observed that Philips was superior substantially. It was only observed that it was marginally better. It was also observed that Philips satisfied almost all tender specifications and Siemens comes next.

5. Mr. Lokesh Roy, learned counsel appearing for Philips accepted that there is no challenge by Philips to the decision taken by the State Government. In the counter-affidavit it has only highlighted its stand of superiority over Siemens. It was urged that Philips had offered a competitive price and it was not proper on the part of the State Government to reject it.

6. The learned Advocate-General appearing for the State, submitted that the State having taken note of all relevant aspects including financial involvements while arriving at its decision, no interference is called for. It is submitted that quality has not been given a go-bye, and since both Siemens and Philips are companies of international repute, the make of distinction between them was really thin. Considering the financial involvement, expertise in the field of supply requisite equipments, the balance tilted in favour of Siemens. No mala fides have been alleged or established to tarnish correctness of decision taken by the High Level Committee of the State. Since mala fides have not been established, action taken in the normal course of official business has the stamp of authentic and bona fide action in usual course of business, and should not be interfered with. The locus standi of the petitioner to file this petition has been questioned on the grounds that he is not supposed to espouse the interest of Philips in the absence of challenge by it. and it leaves a doubt in the mind of any one who comes across the case, that no public interest is involved, and petitioner has been set up to camouflage a private dispute as a public interest litigation. The fact that petitioner has filed several documents dealing with matters which are supposed to be within special knowledge of Philips, lets the cat out of the bag and petitioner is unmasked.

7. Before we grapple with the actual problem, we feel it necessary to keep the records straight so far as public interest aspects are concerned. Public interest

litigation which has now come to occupy an important field in the administration of law should not be publicity interest litigation or private interest litigation. There must be real and genuine public interest involved in the litigation/and it cannot be invoked by a person or a body of persons to further his or their personal causes to satisfy him or his personal grudge and enmity. The Court of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by the apex Court in. Janata Dal Vs. H.S. Chowdhary and Others, . A writ petitioner who comes to the Court for relief in public interest "must come not only with clean hands like any other writ petitioner but also with a clean hand, clean mind and clean objective.

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest any ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as effective weapon in the armoury of law for delivering social justice to the citizens. --The attractive brand name of "public interest litigation" should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. Court must be careful to see that a member of the public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold.

8. The Council of Public interest, Law set up by the Ford Foundation in U. S. A. defined the Public Interest Litigation in its report of Public Interest Law U.S.A 1976 as follows:

"Public interest Law is the name that has recently been given to efforts provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others."

The Court has to be satisfied about (a) the credentials of the applicant: (b) the prima facie correctness of nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting

interests; (a) No body should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (b) evidence of public mischief and to avoid publicly mischievous executive actions. In such cases, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies, of meddlesome interlopers impersonating as public spirited holymen. They masquerade as crusaders of Justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

In "Public Interest Law" edited by Jeremy Cooper and Rajeev Bhavan (Page 58) about the jurisdiction of the Court what was said was:

"Moreover, the judiciary have fairly limited powers at common law to extend the areas of public interest generally and in legal proceedings in particular. The responsibility for such extension and expansion has become a matter of political argument and debate and has fallen on the legislative branch of Government, so that what social, economic, financial or other activities should be regarded as coming within the parameters of the public interest, and if so to what extent and the method of their regulation, are largely matters that have to be enacted by Parliament and statutory instruments"

9. Test litigation, representative actions. Pro Bono Publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to common man and a necessary disincentive to those who wish to by-pass the real issues on merits by suspect reliance on peripheral, procedural shortcomings. Learned counsel for petitioner has stated that he has not proved for a direction to make order in favour of Philips. He is interested in quality equipment being purchased without unnecessary burden on State Exchequer. There is no material to show that he is masquerading as a crusader for justice or is an interloper. We are inclined to accept his locus standi to maintain the petition.

10. The scope of judicial review in matters of administrative decisions has been highlighted by Courts in many cases. In recent times the distinction between administrative orders and judicial or quasi-judicial orders have practically ceased to exist in view of primacy of the rule of law. The point that fails for determination is the scope for judicial interference in matters of administrative decision. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. (See *State of U.P. and Others Vs. Renuagar Power Co. and Others*,). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to

the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it, it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must do what it has been forbidden to do, nor must it do what it has authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the latter or to the spirit of the legislation that gives it power to act, and must not arbitrarily or capriciously. These several principles can be conveniently grouped in two main categories : (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, actually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account and where an authority hands over its discretion to another body *intra vires*.

The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinise the factual bases upon which discretionary powers have been exercised. Judicial review has developed to a stage today when, without reiterating any analysis of the steps by which the development has come about. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is illegality, the second irrationality and the third procedural impropriety. These principles were highlighted by Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Services*: (1984) 3 All. E. R. 935. If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous such exercise of power will stand vitiated. (See *Commissioner of Income Tax, Bombay and Others Vs. Mahindra and Mahindra Limited and Others*,), The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aledous and John Aider in their book "Applications for Judicial Review, Law and Practice thus:

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are constructed restrictively. There are, however, certain areas of Governmental activity, national security being the paradises, which the Courts regard

themselves as Incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable area, for example foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceeding on behalf of the public interest."

(Also See *Padfield v. Minister of Agriculture, Fisheries and Food* : LA (1968) AC 997; and *Council of Civil Services Union and Ors. v. Minister of the Civil Service* : (1984) 3 All E.R. 995 The Court must while adjudicating validity of an executive decision grant a certain measure of freedom of play in the joints to the executive. The problems of Government are practical ones and may justify, if they so not require, rough accommodations illegal it may be and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or commenced. Mere errors of Government are not subject to judicial review. It is only palpably arbitrary exercise which can be declared void. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. While fair-play is an essential ingredient in accepting and in awarding a contract, similarly fair-play in the joints" is also a necessary concomitant for administrative body functioning in an administrative sphere or quasi-administrative sphere.

Discretion, Lord Mansfield stated in classic terms in *John Wilke's case* : (1770) 4 Hur. 2528, must be a sound one governed by law and guided by rule, not by humour. Lord Benning put it eloquently in *Breen v. Amalgamated Engineering Union* : (1971) 1 All. E. R. 148 , that in a Government of Laws "there is nothing like unfettered discretion immune from judicial reviewability". Courts stand between the executive and the subject alert, to see that discretionary power is not exceeded or misused. Discretion is a science of understanding to discern between right or wrong, between shadow and substance, between equity and colourable glosses and pretences and not to do according to one's wills and private affections. Lord Brightman elegantly observed in the case of *Chief Constable of North Wales Police v. Evans* : (1982) 3 All. ER 141 that:

"Judicial review, as the words imply is not an appeal from a decision, but a review of the matter in which the decision was made."

in recent decision of *Tata Cellular v. Union of India* : (1994) 6 SCC 651, the apex Court classified the grounds, of challenge as under:

"Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only

concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) illegality : This means the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The action of the State, the instrumentality, any public authority or person whose actions bear insignia or public law element or public character are amenable to judicial review and the validity of such action would be tested on the anvil of Art. 14 of the Constitution. The classic passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd., v. Wednesbury Corporation* : (1948) 1 K. B. 223 eloquently states the position in law. The same reads as follows:

"It is true the discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used as a general description of the things that must not be done, for instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said to be acting "unreasonably". Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

These aspects have been highlighted by one of us (A. Pasayat, J.) in *Geetanjali Patnaik Vs. State of Orissa and Others*, . *Sri Rama Ballav Rath Vs. State of Orissa and Others*, . and *Sudhir Kumar Kapardar v State of Orissa*, represented by the Secretary, Health and Family Welfare Department and Ors. (OJC No. 2381 of 1994 disposed of on 29-8-1996). Keeping in view the limited scope of judicial review in administrative matters, it is to be seen how far the orders passed by the authorities can be maintained on the touchstone of sustainability.

11. From the counter-affidavit filed by the State, it is seen that the Department of Health and Family Welfare recommended as follows :

"Proceeding of the SLPC may also kindly be seen (Flag-A) Further opinion of an Expert Committee at page 321/C may also be seen.

TECHNICAL :

Philips equipments have been recommended by the SLPC and the Expert Committee as technically superior. However. SIEMENS have also been

recommended as technically meeting the specifications. It is ascertained that Philips have supplied about 25% of the Cath. Labs. available in the country and SIEMENS have supplied about 60% of the Cath. Labs, in the country. Of late Philips appear to be supplying more number of Cath. Labs. Exact quantification of the numbers has not been possible.

CAPITAL COST OF EQUIPMENT :

The implication of foreign exchange fluctuation cannot be frozen at any time. Both the suppliers have made it clear during SLPC meeting that they cannot Bear the risk. For that matter, wherever we choose an important equipment to be paid for foreign exchange we have to bear the risk of foreign exchange fluctuation for the period of L. C. (i. e., from the day of L. C. is opened to the day equipment is supplied three months in this case). It is common knowledge that rupee had depreciated against both Dollar and Mark in last few months but has managed to recover ground since last one month. If we want forward risk coverage, we will need to pay much more money by way of premium (about Rs. 89 lakhs). There is as likelihood of rupee retaining its position for the next three months. But nothing can be said for certain as this is purely a market operation. The forward coverage rate of Dollar is Rs. 36.90 today and the forward coverage D. M. is Rs. 25.16 today as obtained from State Bank of India, Bhubaneswar, we have also obtained today's foreign exchange rates from the State Bank of India, Bhabaneswar. Based on these rates the equipment cost of Philips is Rs. 4,61.07.610/- and that of Siemens is Rs. 4,51,66,283/-. if we go for forward risk coverage, the rate of Phillips will be Rs. 4.90,11,819/- and the rate of Siemens will be Rs. 4 82,02, 680/-.

A decision on the source of procurement may kindly be taken based on the above factors. We should buy the equipment based on the least out-go of our resources."

Thereafter, the matter was further examined by the Finance Department which observed as follows :

"1. The Technical Expert Committee have noted M/s. Philips marginally superior to M/s. Siemens (P. 321/c) Commercial terms, as enumerated at P. 353, 355/C as well as in the preceding notes of Secretary (R & F. W,) seem to weigh in favour of M/s. Siemens. If we apply the current exchange rate (26-3-1996), the capital cost of the equipments to be supplied by M/s. Siemens would cost about Rs. 9.5 lakh less. Even if we evaluate the capital cost by applying the 3 months forward rate (which incidentlly is the delivery period.) M/s. Siemens retains the same advantage.

2. The relative terms of the AMC offer have been brought out in the minutes of the Secretary (H. & F. W.). I do endorse his view that we should go by the terms settled with the parties by the SLPC. If any subsequent negotiation is deemed necessary, both the bidders should be given equal opportunity as at this stage no clear winner has realty emerged.

3. Therefore, it boils , down the -marginal technical superiority of M/s. Phillips-vis-a-vis Commercial advantages of M/s. Siemens at this stage. i would support the proposal of the Secretary (H. & P. W.) to take a decision on the basis of least cost option.""

On consideration Of the recommendation of the Department of Health and Family Welfare and the views of the Finance, Department final order was passed placing the order with Siemens. The moot question is whether the recommendation made by the Department Of Health and Family Welfare and the views of the Finance Department suffer from any of the vices which can attract judicial scrutiny of the decision. On consideration of the recommendations and the views expressed by two Departments, there can be no manner of doubt that relevant aspects have been taken note of. it is to be noted that even though a different views on the matter is possible to be taken by the Court it would have no jurisdiction to do so unless the decision-making process is vitiated and the - order is tainted with mala fides. The case at hand does not appear to be of that nature. Therefore, we decline to interfere in the matter At this stage if is to be also noted that the unsuccessful bidder has not challenged the offer in favour of the Siemens. In the counter- affidavit filed by it and the submissions made during the course of hearing, it was only highlighted Philips system of Cath .Lab cannot be Inferior to that Of Siemens, and may . be superior to It Mr. Ray. learned counsel appearing for Philips fairly accepts that In the absence of any challenge by it to the orders, no advantage can be obtained by it in a writ application filed By the petitioner particularly when there was no prayer to allot it it in favour of Phillips. The only prayer, was to cancel the order in favour of Siemens. It is true prayer can foe modified, and the Court can in appropriate cases grant relief if the circumstances so warrant beyond the prayer. It does not appear to be a case of that nature. We, however, feel that there is substance in the stand of petitioner that the X-Ray tube to be supplied by the Siemens has to conform to the prescribed standard. 3t is an accepted position that the equipment to be supplied is a sophisticated one and it should not have any component of inferior quality. Siemens would not be entitled to additional cost for supply of such equipment, unless it is one offered by it while making its offer; and conforms to the requirement.

The writ application is disposed of No cost.

S.N. Phukan, C.J.

12. I agree.