
(1996) 01 OHC CK 0016
In the Orissa High Court
Case No : O.J.C. No. 6079 of 1995

Geetanjali Patnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-01-1996

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1996 Ori 157 : (1996) 81 CLT 540

Hon'ble Judges : P.C. Naik, J;A. Pasayat, J

Bench : Division Bench

Advocate : Deepak Misra, A. Deo, P.K. Mishra, B.S. Tripathy, P. Panda, R. Rath, D.K. Sahoo and M.P.J. Ray, for the Appellant; R.K. Mahapatra, S. Swain, N.N. Mohapatra and L.D. Das and Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Pasayat, J.—Selection of opposite party No. 7 for opening the second day and night medical store inside hospital premises of the District Headquarters Hospital at Bala-sore is under challenge in this writ application by the petitioner who was one of the applicants. The primary challenge is on the ground that her application has been rejected on untenable premises and opposite party No. 7 has been selected on unsustainable grounds and on extraneous considerations.

2. A brief reference to the factual aspects would suffice:

The Chief District Medical Officer, Bala-sore (hereinafter referred to as "the CDMO") invited applications from lady candidates for opening of day and night second medical store inside the hospital premises of the District Headquarters Hospital at Balasore by issuing an advertisement which was published on daily "The Prajatantra" on 20th May 1994. Applications complete in all respects were required to reach the CDMO, Balsore within fifteen days from the date of publication in the said newspaper. Certain criteria for submission of applications were indicated which essentially are as follows:

(i) A person having requisite qualification may apply for running a medical store in Government Hospital;

(ii) A person to be considered eligible for the purpose shall be a registered Pharmacist either with Degree or Diploma in Pharmacy But a person who can engage a pharmacist irrespective of whether he himself is a pharmacist or not may be considered;

(iii) An unemployed person having previous experience of running medical store shall be given preference and all other things being equal, persons who have crossed the age limit for entry into Government service shall be given preference. Petitioner submitted an application on 3-6-1994. She submitted a certificate to the effect that she is a Graduate of Arts, has appointed a pharmacist and also certificate of experience of having worked in a drug shop. According to her, she was 31 years of age at the time of submission of application and had crossed the outer age-limit fixed for entry into Government service. Opposite party No. 7 was also one of the applicants, and was 25 years of age at the time of her making the application. Officer of the CDMO, Balasore intimated the Director of Health Services, Bhubaneswar about the applications received. He was intimated by letter dated 17-6-1994 that the petitioner had submitted four sheets of enclosure whereas opposite party No. 7 had enclosed one sheet. By letter dated 26-8-1995 issued by the Under Secretary to the Government, Health Department addressed to the CDMO, Balasore selection of opposite party No. 7 as a suitable candidate was intimated.

3. The petitioner's grievance is that opposite party No. 7 has been selected on irrelevant considerations, and her case has not been duly considered. It is further submitted that there was no stipulation in the advertisement that any person whose relative is operating another shop is disentitled. The conditions of the advertisement were not complied with by opposite party No. 7. There was no material before the opposite parties 1 and 2 to come to a conclusion that opposite party No. 7 was a physically handicapped person. The certificate which has been annexed to the counter-affidavit merely shows that it has been issued by a Senior Orthopaedic Specialist, It was stated therein that opposite party No. 7 was suffering from lumbar spondylitis and rheumatoid arthritis which results physical disability for free movement, and she has been advised to do sedentary work. By no stretch of imagination the same cannot be considered certificate regarding physical disability. There was no indication in the advertisement that preference would be given to a physical handicapped person. The so-called physical disability certificate was not filed along with the application. In the matter of grant of largesse by the State, fairness is the key factor and in the case at hand all the norms have been thrown to wind to bestow benefit on opposite party No. 7 on irrelevant considerations and with ulterior motives.

In the counter-affidavit filed, the State of Orissa represented by its Secretary, Department of Health, and the Under Secretary to Government, Department of Health have taken the stand that the petitioner has not come to this Court with

clean hands. Her husband was operating the first day and night medical shop inside the hospital campus and the selection of petitioner would have led to monopoly which is contrary to State's objectives to provide employment facilities to more unemployed persons to earn their livelihood. It is further stated that opposite party No. 7 was a physically handicapped person and therefore, was given preference. Though there was no certificate enclosed to the application form, in view of the undertaking given by opposite party No. 7 in the application to abide by the terms and conditions that would be fixed by the Government in terms of the advertisement, she was considered suitable. It is stated that there was no stipulation in the advertisement to submit documents along with the application. Therefore, her application was not a bald application as stated by the petitioner. Petitioner has not crossed the age of entry into Government service since she was 31 years and the upper age-limit for entering the Government service is 32 years. It is also relaxed by five years in respect of woman candidates.

4. In the counter-affidavit filed by opposite party No. 7, stand taken is that the petitioner is running a medicine shop on permanent basis with one Smt. Saraswati Sahoo. It is further stated that there was allegations of infractions under the Drugs and Cosmetics Act, 1940. The age of opposite party No. 7 is 46 years and not 25 years as stated by the petitioner.

Learned counsel for State and opposite party No. 7 have taken a stand that the scope of judicial review in respect of administrative actions is very limited and considering the nature of dispute raised, no interference is called for.

5. It is strict law that when a discrimination is involved at the very threshold or at the time of entry into the field of contract with the Government, different considerations arise, and at that stage the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into very transaction in exercise of its constitutional power. Arbitrariness in such matters would attract Article 14 of the Constitution. Giving of a contract to a competitor can be challenged if the same is arbitrary or vitiated by any legal infirmity. Even where a tender notice allows the authority to reject highest tenderer without assigning any reason, the choice cannot be unreasoned or unprincipled. In *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, it was emphasised that public interest is involved in the granting of largesse. Validity of such a matter has to be tested on the twin touchstone of reasonableness and public interest, and failure to satisfy either test would render the action invalid. The State cannot even in its exercise of administrative power while dealing with its largesse act in an arbitrary and unprincipled manner, and has to satisfy the Court if called upon that its actions were bona fide and not actuated with any mala fide or irrelevant considerations. The basis requirement is that the cases of applicants who have sought for grant of its largesse must be considered dispassionately. In the case at hand, criteria for making application

and in the matter of preference are spelt out from the advertisement itself. Preferential treatment was to be extended to one (a) who has crossed the age limit for entry into Government service, (b) with previous experience of running a medical store, and (c) who is a registered pharmacist. The object seems to give preference to a person who is financially at a lower footing than another. The undisputed position being that the petitioner's husband is running first medical store, her selection would have encouraged monopoly. That is not the object, and it appears to be the reverse. In view of this conclusion, we would have dismissed the writ application on the normal course. But certain disturbing features exist, which warrant a further adjudication of the question whether the State and its functionaries have acted bona fide. Pursuant to our direction the relevant file was submitted for our perusal. We find that in the case of opposite party No. 7 there was practically no document in support of her stand and in her application she did not even mention about her physical deficiency. The relevant portion of the application reads as follows:

"That we have 3 years experience of medical store in Motiganj Bazar. My son is an unemployed and also a graduate."

It is seen that when the application was made, opposite party No. 7 did not even make any whisper about her being a physically handicapped. It is not clear from records as to when the certificate of physical disability issued by the doctor came into possession of the authority, who had filed it and when. Subsequently a certificate of a doctor stating that he examined ailments of opposite party No. 7 and noticed physical disability, was brought into records. A shocking state of affairs revealed. In the application opposite party No, 7 mentioned to have enclosed one copy of experience certificate, But strangely it is not available on records and what finds place is a xerox copy of a certificate issued by the doctor stating about the physical disability of opposite party No. 7, The record appears to have been manipulated and the authorities having acted with apparent ulterior premises, the decision in favour of opposite party No. 7 cannot be maintained.

6. The letter dated 17-6-1994 (Annexure-5) shows that there was only one enclosure to the application of opposite party No. 7 and as referred to above, same was the experience certificate as evident from the application itself. But that appears to have been taken out and has been substituted by the certificate of the doctor. Further revealing is the letter of the Director of Health Services, Orissa, Balasore addressed to the Principal Secretary to Government, Health and Family Welfare Department. The names of the applicants and various details have been indicated in a chart enclosed to the said letter dated 18-7-1994. So far as opposite party No. 7 is concerned, nothing has been stated in several columns, i.e., qualification, engagement of pharmacist and past experience, and the only remarks made are to the following effect:

"She wants to open the medicine-shop in the name of her son, who is an unemployed graduate."

Definitely therefore, on 18-7-1994 the certificate of doctor was not on record for consideration. On 24-4-1995, the Chief District Medical Officer, Balasore in his letter addressed to the Under Secretary to the Government of Orissa, Health and Family Welfare Department in response to the latter's letter dated 15-4-1995 gave certain details. Nothing was indicated in the columns relating to engagement of pharmacist, whether a registered pharmacist, employment but a new column was inserted relating to whether the applicant belonged to S.C./S.T. or physically handicapped and the answer was given as "yes". So far as the column relating to previous experience is concerned, it was indicated that no experience certificate was furnished. So far as the column relating to furnishing of documents is concerned, the indication was "no". Though a reference was made to the letter of Under Secretary dated 15-4-1995, it is clear from the said letter that there was no requirement to indicate anything about whether the applicant belonged to S.C./S.T. or physically handicapped. This appears to have been inserted with a view to give preferential treatment to opposite party No. 7. It is of relevance to note here that in the advertisement there was no indication to furnish any particular or document relating to Scheduled Caste or Tribe or Physically Handicapped. It is, therefore, not clear as to on what basis the details were compiled. To add to the vulnerability, is the mysterious appearance of the certificate of the doctor. It is not known as to when and how it got into the records, and who received it and under what authority.

7. The scope of judicial review in matters of administrative decisions have been highlighted by the 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 falls for determination is the scope for judicial interference in matters of administrative decisions. 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 if 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 terms 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 not do what it

has been forbidden to do, nor must it do what it has been 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 letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. There 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, mutually 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 in acts ultra 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 ER 935, If the power has been exercised on an 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 have been summed up by Grahme Aladous and John Alder 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 construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, 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 inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* this is doubtful. Lords Diplock, Scotman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative 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

areas, 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 proceedings on behalf of the public interest."

(Also see *Padfield v. Minister of Agriculture, Fisheries and Food* : (1968) AC 997 and *Council of Civil Service Unions v. Minister for the Civil Service* : (1984) 3 All ER 935 (HL). The Court must while adjudicating validity of an executive decision grant a certain measure of freedom or play in the joints to the executive. The problems of Government are practical ones and may justify, if they do 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 condemned. 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 an 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 Bur 2528, meant sound one governed by law and guided by rule, not by humour. Lord Denning put it eloquently in *Breen v. Amalgamated Engineering Union* : (1971) 1 All ER 1148, than 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. Lord Brightman eloquently 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 a recent decision of *Tata Cellular v. Union of India* : (1994) 6 SCC 651: AIR 1994 SCW 3344, the Apex Court classified the grounds of challenge as under (at pp. 3368-3369 of AIR SCW):

"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 of public law element or public character are amenable to judicial review and the validity of such action would be tested on the anvil of Article 14 of the Constitution. The classic passage from the judgment of Lord Greene in *Provincial Picture Houses Ltd. v. Wednesbury Corporation*:

(1948) 1 KB 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 (sic) 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."

8. Keeping in view the aforesaid principles, the inevitable conclusion is that there has been arbitrary exercise of powers by the administrative authorities which brings application of Article 14 of the Constitution. In the circumstances, selection of opposite party No. 7 is quashed. The authorities are directed to consider the matter afresh taking into consideration all relevant aspects. It is open to them to make a fresh advertisement to achieve the intended objectives. Whatever have been observed by us vis-a-vis petition and opposite party No. 7 are for the purpose of findings out the legality of non-selection of petitioner and selection of opposite party No. 7.

The writ application is allowed, but in the circumstances without any order as to costs.

P.C. Naik, J.

9. I agree.