
(1999) 04 OHC CK 0016

In the Orissa High Court

Case No : Original Jurisdiction Case No. 10724 of 1997

Golaphula Mahakul

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 13-04-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa High Court Rules, 1948 — Rule 23, 26, 3(1)

Citation : (1999) 1 OLR 674

Hon'ble Judges : R.K. Patra, J; R.K. Dash, J

Bench : Division Bench

Advocate : G. Rath and B.R. Sarangi, for the Appellant; Additional Government Advocate for O. Ps. 1 to 3, B.K. Nayak, J.K. Khuntia and S.S. Patra for O.P. 4, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—The case as presented in this application under Articles 226 and 227 of the Constitution of India is plain. The relief claimed by the petitioner is simple. Her unerrant prayer is for issuance of an appropriate writ quashing the Government Order No. 31 167/H. Dated 26.7.1997 (Annexure-8) selecting Pramila Digal (opp. party No. 4) to open a 24-hour medical store in the campus of District Headquarters Hospital, Kandhamal. But in course of hearing the case has triggered off an issue peculiar to it.

2. The case of the petitioner is that pursuant to the advertisement (Annexure-6) she applied for permission to open a 24-hour medical store (reserved for ladies) in the campus of the District Headquarters Hospital, Kandhamal. She stated in her application form that she has the experience of selling medicines as a Sales Assistant in the Medical store and can engage two pharmacists. She indicated names of two pharmacist, with their registration numbers. She had also enclosed solvency certificate of Rs. 1,00,000/-. The opp. party No. 4 also applied for such permission in respect of the very medical store. In her application she stated that

she is a housewife and can engage one pharmacist. She furnished solvency certificate of Rs. 66,500/- only. According to the petitioner on merit she stands on a better footing than that of opp. party No. 4 who has no experience of running a medical store. The State Government however illegally selected the latter for the purpose. The permission granted to opp. party No. 4 is arbitrary, illegal and contrary to the guidelines prescribed by the Government in the matter of opening of medical stores in the campus of District Headquarters hospitals.

3. The State Government in Health and Family Welfare Department is opposite party No. 1 and the Director of Medical Education and Training, Orissa, is opp. party No. 2. They have filed their counter affidavit pleading that the claim of the petitioner that she has got professional experience is a myth inasmuch as the experience gained as Sales Assistant cannot be considered to be professional experience. The opp. party No. 4 being a woman belonging to Scheduled Caste was given preference and she was selected "taking into account various considerations which have been narrated aforesaid."

Opp. party No. 4 has filed a separate counter affidavit on 13.9.1997. She has averred that she has experience in running medicine shop/ selling medicines as Sales Executive in the medicine store. The documents submitted before the authority would indicate that she has more than eight years of experience in selling medicines. She has been selected "on the basis of her own merit".

The petitioner has filed rejoinder on 30.9.1997 and asserted that opp. party No. 4 had simply stated in her application form that she is a housewife and had not furnished any information with regard to her experience. In paragraph 6 of the rejoinder the petitioner has alleged as follows :

"6. That on perusal of paragraph 10 of the counter affidavit filed by the opposite parties 1 and 2 a particular statement has been scored through by the authorities while swearing the affidavit with regard to such experience acquired by the opposite party No. 4 which is not available on record....."

Opp. party No. 4 has filed an affidavit in opposition to the rejoinder. She has stated that if the records are called for, it would disclose that she had furnished the experience certificate along with her application.

4. Before embarking on further discussion, it is necessary to outline here certain facts which have direct bearing on the point at issue.

The Government of Orissa in Health and Family Welfare Department's letter No. 17782/H dated 13.5.1993 has laid down certain procedure for opening of 24-hour medical stores in the campus of Medical College Hospitals/District Headquarters Hospitals and Hospitals equivalent to them and Sub-Divisional Hospitals of the State. The present being a case of opening of such medical store in the District Headquarters Hospital, we may refer to such of the paragraphs of the aforesaid Government letter relevant for the purpose. Para-3 thereof states that the concerned Chief District Medical Officer (CDMO in brief) after making

necessary assessment with regard to the need for having 24-hour medical store in the campus of his hospital should make an order to that effect in the concerned file and issue advertisement at least in two local dailies inviting applications from eligible persons. Para 4 of the aforesaid Government letter further provides that the applications received in response to the advertisement shall be sent to the Director of Health Services who shall in turn forward the same to the Government along with his views/comments for final decision at the Government level. Para 5, as substituted by Government Order No. 19665/H, dated 26.5.1993 deals with the criteria for selection. It reads as follows :

"2. xxx xxx xxx (i) Any person having the 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 a 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 a medical store shall be given preference."

The C.D.M.O. issued the advertisement (Annexure-6) inviting applications from intending persons for opening of two numbers (one being reserved for ladies) of 24-hour medical stores in the campus of the District Headquarters Hospital, Kandhamal. The advertisement stipulated that all the applications in the proforma should reach the C.D.M.O. on or before 15.5.1997. Pursuant to the aforesaid advertisement, the petitioner, opp. party No. 4 and some others put in their applications. The C.D.M.O. made a chart applicant-wise together with the required informations and sent the same to the Director of Health Services in his letter No. 3705 dated 9.6.1997. The Director, Health Services in his turn forwarded all the applications with the original documents appended thereto by the C.D.M.O. to the State Government in Directorate Letter No. 28759 dated 2.7.1997 (This letter finds a place at 238/c of the Government File No. II-Med-IIM-31/97). The Director wrote in his letter as follows :

"So all the applications with the original documents appended thereto by the C.D.M.O. (as it is) along with the paper cutting of advertisement published in the local daily the Samaj dated 29.4.1997 with a statement are sent herewith for perusal of the Government".

The Minister, Health and Family Welfare thereafter passed orders in selecting opp. party No. 4 which decision was communicated in the impugned Government order (Annexure.8).

5. Shri G. Rath, learned senior counsel for the petitioner, contended that opp. party No. 4 has no experience in running a medical store and the petitioner having such experience should have been selected. He drew our attention to Annexure-7 (a tabular statement of applicants with their respective bio-datas)

from which it would appear that under column No. 6 (profession) nothing was mentioned with regard to opp. party No. 4 except that she is a housewife. Learned counsel submitted that the last sentence of the first sub-para of para-10 of the counter affidavit of the Government, copy of which had been served on him, had been struck out, which means that she (opp. party No. 4) had not furnished any experience certificate. Learned counsel stated that there was tampering with the Government file in the office of the Advocate General for which the Secretary of the Department had taken a serious view of the matter. In view of such allegation, we called upon the learned Additional Government Advocate to produce the relevant files. Pursuant to our order, File Nos. II Med. II W 13/97 and No. II Med. IIM 31/97 were produced for our perusal. We have carefully gone through the notings in the files. From File No. II Med. II W 13/97 it appears that the Additional Government Advocate required the said file for his perusal and accordingly the Senior Assistant in-charge of the file (B. Pradhan) produced the same before him on 3.9.1997. The said State Counsel wanted to retain the file for being produced before the Court. The Senior Assistant of the Department was not inclined to hand over the file without obtaining orders from the competent authority. Because of insistence by the learned Additional Government Advocate, the Senior Assistant of the department left the file with him keeping the xerox copies of the relevant note sheets and papers connected with the case. On 28.10.1997 the file was received by the Assistant Law Officer who noticed that two of the original papers in the file were replaced by two sheets of new papers relating to opposite party No. 4. The Assistant Law Officer at Pages 9-10 of the note sheet of the file noted as follows :

"The paper which was replaced during the period of retention of the file by the Addl. Government Advocate was enclosed at correspondence side of the file bearing No. II-Med.IIM-31/97 at pages 213 and 214 while the paper at page 213 referred to detailed bio-data of Smt. Pramila Digal (the Respondent No. 4) the paper at page 214/C related to a letter of Smt. Pramila Digal addressed to the C.D.M.O., Kandhamal. As per her bio-data Smt. Pramila Digal was a housewife by profession and had no previous experience in running of Medical Store. But the two sheets of paper inserted into the file in place of above mentioned two papers related to one experience certificate and one proforma application containing the bio-data of Smt. Pramila Digal. The xerox copy of inserted papers may please be perused at flag "A".

The bio-data sheet inserted at page-214 in place of earlier application form kept at p. 214 now indicate that Smt. Digal has experience as a Sales Executive and the paper inserted at page 213 relate to one experience certificate issued by one M/s. Mahalaxmi Pharmaceutical Agency, Phulbani, where earlier a formal application to CDMO existed.

The insertion of papers can be marked out from other papers as the handwriting of page serial in respect of all other papers surprisingly differ from these two inserted papers. The xerox copy of original papers retained with the Sr. Asst.

stands to the veracity of the mischief committed. The xerox papers of original papers may please be perused at Flag "B" and may be perused with linked file No. II-Med.-IIM- 31/97".

The Deputy Secretary on 18.11.1997 brought the matter to the notice of the Secretary of the Department who observed that "this is a very serious misdemeanour. The file which was left at the Advocate General's office at their request has been tampered with and some papers replaced with others obviously with a view to build a strong case for one of the respondents....". The Secretary accordingly drew the attention of the Additional Chief Secretary who suggested that necessary clarification from the concerned Additional Government Advocate may be sought for through the Advocate General "on the tampering of the file". The Chief Secretary endorsed the views of the Additional Chief Secretary. The Secretary of the Department thereafter in letter No. 47882/H dated 26.11.1997 (page-61/c of the file) requested the Advocate General to look into the matter personally stating that "the act of tampering has serious implication in the case and speaks against the credibility of the institution of the Advocate General". We need not further dilate on this aspect.

6. Now coming to the other aspect of the submission of Shri Rath, we may state that the last sentence of the first sub-para of para- 10 of the copy of the counter affidavit of the State Government served on him before it was struck out read as follows :

"The opp. party No. 4 has also furnished an experience certificate having sufficient knowledge of medicine and shop with an experience of 10 years as a sales executive in Mahalaxmi Pharmaceutical Agency at Phulbani".

From the copy of the said counter affidavit retained in the Government file (pages-48/55/c of file No. II-Med.IIW-13/97) it is noticed that the aforesaid sentence remains struck out. It therefore follows that the copy of the counter affidavit served on the counsel for the petitioner and the copy of it retained in the Government file are copies of the original which was affirmed by the Under Secretary. Strangely in the counter affidavit which was filed in Court on 18.9.1997, the aforesaid sentence does not find mention at all. It means that the Court's copy of the counter affidavit was separately typed and the petitioner's copy and the copy retained in the Government file were typed at different time. One careful comparison of the Court's copy with that of petitioner's copy and the copy retained in the Government file, it appears that they were typed in two different type machines. Attempt seems to have been made to type out the relevant pages of the Court's copy line by line, but it could not be done which is evident from the 8th line of page-6 of the counter affidavit with regard to the word "assessment". In Court's copy the word "assessment" finds place as the last word of the line whereas in other copies (petitioner's copy and the copy retained in the Government file) the word "assessment" was typed in a split- up manner like "assess" and "ment" in two different lines, i.e. "assess" at the end of the 8th line whereas "ment" at the beginning of the 9th line. In the

petitioner's copy of the counter affidavit page number 6 was typed as "/6"7" whereas in other copies it is typed as "/ 6 /", i.e., with a space between the oblique mark and the figure 6. We may at this stage refer to the parawise comments sent by the Government to the office of the Advocate General for preparing counter-affidavit. In reply to para-10 of the writ application it was mentioned as follows :

"The merits of the petitioner as well as opp. party No. 4 have been properly assessed. The opp. party No. 4 was selected only on the basis that she is overaged and belongs to S.C. community."

Our purpose to refer the parawise comments with regard to para-10 of the writ application is to highlight that the Under Secretary who affirmed the affidavit intended to state and stated that opp. party No. 4 had not furnished any experience certificate.

7. Now coming to the main issue, we find from pages 256/257/c of the Government file (II-Med.-IIM-31/97) that Shri Nagarjun Pradhan. Minister of State. Commerce, Orissa suggested to the Chief Minister, Orissa, vide letter dated 4.7.1997 as follows :

"Hon"ble Chief Minister, Orissa

1. Opening of new medicine store at District Headquarters Hospital, Phulbani in favour of

Pramila Digal, W/o. Sri Radhakanta Digal, Masterpada, Kandhamal (Phulbani)

2. For Raikia C.H.C.

Health Sri Ranjan Kanta Pradhan, Minister to Brother of Sri Nagarjun Pradhan, see Minister (S), Commerce, Orissa, Bhubaneswar. Sd. Sd. 4.7.1997 Chief Minister, Orissa (NAGARJUN PRADHAN)"

To the said letter experience certificate purported to have been granted by M/s. Mahalaxmi Pharmaceuticals Agency on 1.5.1997 in favour of opp. party No. 4 was enclosed. The Chief Minister on that day endorsed it to the Minister of Health. On 18.7.1997 the concerned Minister passed order so far as it relates to opp. party no. 4 as follows:

"Smt. Pramila Digal is an age barred candidate who belongs to S.C.(Harijan by sub-caste). She has also furnished experience certificate of running a medicine shop. She is also unemployed. In view of this, Smt. Pramila Digal is allowed to run the 24-hour medicine shop....."

The file came to the Deputy Secretary who on 21.7.1997 suggested that op. party No. 4 who had been selected is not a pharmacist and as per the Government circular the case of a non-pharmacist can only be considered when there is no claim from a registered pharmacist. As there were claims from registered Pharmacists, the Deputy Secretary wanted it to be brought to the

notice of the Minister for reconsideration of his order. The file was again placed before the Minister on 24.7.1997 who however stuck to his previous order.

8. On careful examination of the entire matter, we are of the considered opinion that the experience certificate of opp. party No. 4 for the first time made entry into the Government file on 4.7.1997 through Shri Nagarjun Pradhan, Minister of State, Commerce, Orissa. The said certificate was not enclosed or furnished along with her application made to the C.D.M.O. pursuant to the advertisement. That is the reason why in the chart prepared by the C.D.M.O. against the column "experience" opp. party No. 4 was merely described as "house- wife". Had she enclosed the said certificate along with her application. the C.D.M.O. would not have failed to send it to the Government through the Director of Health Services and would have indicated it in the relevant column. Had she enclosed it to her application. she could have also asserted emphatically in her counter affidavit by appending it which she had not done. In the circumstances mentioned above, we have no hesitation to hold that the application of opp. party No. 4 filed before the C.D.M.O. was not accompanied by the experience certificate and it surfaced for the first time on 4.7.1997 through the Minister of State, Commerce and cruised into the Secretariat file through the corridors of power. The advertisement (Annexure-6) stipulated that the application forms with necessary particulars were to reach the C.D.M.O. on or before 15.5.1997. Since by the stipulated date the application of opp party No. 4 was without any experience certificate it is to be considered as such. The deficiency in her, i.e., lack of experience in running a medical store is not available to be made good at the Minister's level on production of the experience certificate by means of back door entry as indicated above. As pointed out by the Assistant Law Officer, to cover up this short-fall, pages 213-214/c in the Government file were substituted with a view to establish before the Court by producing the file that her application was accompanied by the experience certificate.

For the reasons aforesaid, the decision taken by the then Minister of Health in selecting opp. party No. 4 is vitiated in law and is liable to be quashed.

9. At this stage the contention of Shri Nayak, counsel for opp. party No. 4 may be noted. He contended that the writ application is not maintainable as the same was neither affirmed nor verified by the petitioner herself as required under Rules 3 (1), 23 and 26 of Chapter-VI of Part-II of the Orissa High Court Rules, 1948. This contention has to be noted to be rejected because in her counter affidavit opp. party No. 4 has not taken any such plea except with regard to the authenticity or otherwise of Annexure-7. There cannot be any dispute with regard to the legal proposition that defect in verification is only an irregularity in procedure and it does not affect the jurisdiction of the Court. Provisions of law relating to procedure are there to serve the ends of justice. The rules and procedures are intended to be hand-maid to the administration of justice. Merely because the application was not verified or affirmed by the petitioner as per the rules, we cannot jettison her application on that ground alone. Shri Nayak also

doubted the correctness of Annexure-7 which is a detailed chart applicant-wise with their bio-data. From the Government file, we find that it is a copy of the chart enclosed to the Director of Health Services" letter No. 28759 dated 2.7.1997. There is therefore nothing to doubt the authenticity of Annexure-7.

10. In the result, the decision of the Government as communicated in the Government order at Annexure-8 is hereby quashed. The State Government is directed to consider the matter afresh keeping in view the circulars governing the field. The consideration will now be confined to the petitioner and opp. party No. 4 only because other applicants have not chosen to question the validity of rejection of their applications. While considering the matter, the State Government will not take into consideration the experience certificate of opp. party No. 4 for the reasons already mentioned.

The writ application is accordingly allowed. There would be no order as to costs.

11. Before parting with the case, may it be stated that after the hearing of this case was concluded and it was reserved for judgment, a registered letter purported to have been sent by opp. party No. 4 was received in the Registry. It is a note of submission which contains nothing substantial.

12. The Registry is directed to send a copy of this judgment to the Law Department of the State Government for being placed before the Minister of Law.