

**(2013) 05 PAT CK 0047**

**In the Patna High Court**

**Case No : LPA No. 238 of 2013 in CWJC No. 2042 of 2011**

Munna Kumar Prasad

APPELLANT

Vs

M/s. Bharat Petroleum Corporation Ltd. and Others

RESPONDENT

**Date of Decision : 15-05-2013**

**Acts Referred:**

Constitution of India, 1950 — Article 226

Contract Act, 1872 — Section 17

Income Tax Act, 1922 — Section 25, 48

**Citation : (2013) 2 PLJR 942**

**Hon'ble Judges : Shivaji Pandey, J;Navin Sinha, J**

**Bench : Division Bench**

**Advocate : S.A. Narain and Uma Kant Prasad, for the Appellant; Sanjay Singh . No. 1 to 4, Y.V. Giri and Raju Giri for the Respondent: No. 7, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

Navin Sinha, J.—We have heard Counsel for the Appellant, the Respondent Corporation and for private Respondent No. 7. The present Appeal arises from order dated 1.10.2012 allowing CWJC No. 2042 of 2011 preferred by respondent no. 7, the second empanelled candidate, questioning the selection and grant of retail outlet dealership to the Appellant. The learned Single Judge opined that the Appellant had presented an interpolated document with regard to lands offered for dealership amounting to a fraud on the Corporation. The Corporation has been directed to prepare a statement of facts and forward it to the Superintendent of Police, Siwan, for necessary action. Commissioning of the dealership has been directed to be kept in abeyance with liberty to advertise afresh.

2. Learned Senior Counsel for the Appellant submits that the registered Lease Deed obtained by him from the landowner for establishing the retail outlet contained an inadvertent omission when it mentioned the plot no. as 757 instead of 787. The deed of correction to read as Plot No. 787 was executed on

14.8.2012. The landlord of Plot No. 787 had not denied having entered into a registered lease agreement with the Appellant. No third person had claimed that his lands had wrongly and unauthorisedly been offered by the Appellant without his consent and selection obtained on that basis. The question of any deliberate fraudulent misrepresentation to wrongly obtain the dealership does not arise. Reliance was placed on *Sheodhyan Singh and Others Vs. Musammat Sanichara Kuer and Others*, to submit that the error with regard to the plot number was inconsequential so long as the parties were under no misunderstanding and the boundaries of the leased lands as mentioned in the Lease Deed were correct.

3. The Appellant, alongwith his application had enclosed a copy of the Lease agreement which disclosed the area of the lands as 120 feet x 110 feet. The site map submitted was not to scale. The Appellant had not made any misrepresentation or practiced fraud with regard to the size of the plot and wrongly obtained any benefit. The site map and the Lease Deed had to be and were considered together by the Corporation. The Appellant did not and could not have offered any land in excess of the subject matter of the Lease. Clause 1(b)(iii) of the advertisement reserved the right to consider even if there was variation in land measurements provided it met the requirements for grant of NOC under the Petroleum Rules, Indian Road Congress Norms and the Explosives Act. The revised map of the lands prepared by the Revenue authorities showed the lands to be 35 meters x 35/30 meters. Reliance was placed on *Rama Shanker Misra and Brothers Vs. Regional Transport Authority, Kanpur and Others*, to contend that on the facts there had been no misrepresentation to obtain an advantage wrongly by intentional concealment of any fact. The complaint of respondent no. 7 had been also examined by the Ministry of Petroleum and Natural Gas and found without substance.

4. Respondent No. 7 does not dispute that the Appellant otherwise fulfills conditions of eligibility and is the first empanelled candidate. The challenge by Respondent No. 7 was not bona fide but motivated by desire to unseat the Appellant one way or the other as to derive a benefit as the second empanelled candidate.

5. Selection of a candidate for grant of dealership is an administrative matter and the location of an outlet a commercial decision. The Court, in judicial review shall primarily examine the decision making process in both situations. The Corporation and the Selection Committee were fully aware of the land measurement and location offered by the Appellant. They have not been misled in any manner and did not consider the candidature on any assumption of facts different from what it actually was. No mala fides has been alleged against the Selection Committee much less any irregularity in the process of selection. The Court cannot sit in judgment over the decision of the Selection Committee to reassess comparative suitability; much less can it reassess the commercial viability of the location for dealership as opined by the Corporation.

6. Learned Senior Counsel for respondent no. 7 submitted that the Appellant had

practiced fraud on the Corporation by offering Plot No. 757 for which he had no lease agreement. Fraudulent interpolation to read as 787 was made by the Appellant in the lease deed submitted to the Corporation by overwriting. The subsequent rectification Deed was sufficient proof for presentation of an interpolated document. It alone is sufficient to vitiate his candidature.

7. The advertisement stated that the lands offered must be 35 meters x 35 meters in size. If a candidate misrepresented the dimensions of the plot offered he was ineligible to be considered as it amounts to deliberate misrepresentation. If he had mentioned the correct dimensions and the relaxation clause were invoked matters were entirely different. The site map submitted by the Appellant wrongly represented that the plot offered by him was 35 meters x 35 meters. The Appellant had given an undertaking that his candidature was liable to be cancelled if he had made any misrepresentation and which includes the site map. The affidavit submitted alongwith the application also acknowledged that the Letter of Intent could be withdrawn if it had been obtained by misrepresentation. Clause 21 of the guidelines provided for cancellation if the information furnished by a candidate was found to be false at any time. Under Clause 10(h), (i), (k) of the guidelines an application could not be supplemented. Incomplete applications had to be rejected and if incorrect or false information which included concealment had been practiced the selection was liable to be set aside. No reasons have been assigned by the Corporation for grant of relaxation to the appellant whose candidature itself was based on misrepresentation. The respondent no. 7 and others also had offered lands with the desired dimensions. The learned Single Judge has arrived at a finding that the appellant had practiced a fraud with regard to the identity of the land.

8. Respondent No. 7 filed LPA No. 71 of 2013 aggrieved that the learned Single Judge erred in not issuing a consequential Mandamus in his favour as the second empanelled candidate. The order of the learned Single Judge was affirmed on 17.1.2013. The present appeal was therefore barred by res judicata and finality inter parties as both the Corporation and the Appellant were party respondents. Reliance was placed on Pandit M.S.M. Sharma Vs. Dr. Shree Krishna Sinha and Others, , Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, , Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, . If the dealership had been obtained by fraud and misrepresentation, any investment made by the Appellant as was submitted on behalf of the Corporation also is an irrelevant consideration. Reliance was placed on A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, . The Corporation had not questioned the order of the learned Single Judge presently assailed and therefore was estopped from justifying its selection.

9. Learned Counsel for the Corporation submitted that noticing the discrepancy between the size of the plot mentioned in the Lease Deed submitted by the Appellant and that mentioned in the site map, not to scale, and which only mentioned the dimension of two sides, the site evaluation by the Technical

Committee prior to interview, under the selection guidelines, disclosed that the plot was 35 meters x 35/30 meters. The Appellant was required to obtain certification with regard to the area offered from the Revenue Authority which was submitted on 3.12.2010. The Selection Committee was fully aware of the location and actual dimensions of the lands when it considered the candidature of the Appellant and was not misled in any manner or the consideration vitiated by any misrepresentation. After considering all commercial and technical parameters prescribed under the guidelines for selection, the Interview Board considered his candidature in view of the permissibility for variations in land measurement as mentioned in the advertisement. The site variation has been no impediment, the Corporation is satisfied with the viability and the commercial aspect of the location. NOC has been granted by the District Magistrate on 14.2.2011 under the Petroleum Rules, it was in conformity with the Indian Road Congress Norms and license has been granted by the Explosive Department on 24.2.2011. On a complaint by respondent no. 7 received through the Ministry of Petroleum, the Executive Director of the Corporation submitted a report after proper verification which was accepted by the Ministry also.

10. We have considered the submissions made on behalf of the parties. The respondent Corporation advertised on 30.5.2010 for appointment of a retail outlet inter alia at Andar (Andar-Darauli road). The minimum size of the plot with frontage and depth mentioned was 35 meters x 35 meters. Clause 1(b)(iii) of the advertisement provided that in the event of variation in land measurement, candidature could be considered if conditions for NOC from the District Magistrate, Indian Road Congress Norms, Explosive License were fulfilled. Clause 14 of the guidelines for selection stipulated that availability of a suitable site at the advertised location was the essence of the project. Applicants who "owns" or have registered lease for a minimum period of 15 years for suitable land at the location will be given weightage over applicants who only have a "firm offer" from third parties. The technical/commercial suitability of the land would be decided by a Committee of Oil Company Officers based on predefined parameters as mentioned in the guidelines. The furnishing of false information or concealing of any information would lead to cancellation of selection and grant of letter of intent to the second empanelled candidate.

#### LEASE DEED

11. Indisputably the Appellant was in possession of a registered lease agreement for 30 years with regard to lands for the proposed dealership. Respondent No. 7 had submitted a notarized affidavit from the landowner of willingness to lease the lands if he was selected. Under the guidelines the Appellant was better placed.

12. The lease deed dated 28.6.2010 in favour of the Appellant has been scribed by Deed Writer Shri Niwas Singh. While writing the Deed he mentioned the identity of the land as Khata No. 206, Survey No. 790/757 measuring 120 feet east to west and 110 feet north to south. The number 757 was erroneously by

human error scribed by him in place of 787. The last date for submission of the applications mentioned in the advertisement was 2.7.2010, barely three days from the date of the execution of the Lease. The Appellant in his anxiety and hurry to apply for the dealership instead of having corrections made in the original deed and obtaining fresh certified copies of the same, by overwriting corrected 757 to read as 787. The Appellant subsequently obtained a Deed of Rectification on 14.8.2012 to read as 787. This ground was not taken by Respondent No. 7 in his writ petition which was confined only to the dimensions of the plot. The Appellant did not offer any lands for which he did not possess leasehold rights. The question of fraud or misrepresentation therefore does not arise.

13. The landowner of Plot 787 never denied having executed lease agreement with the Appellant. No third person objected that his lands had wrongly been shown as leased by the Appellant. The procedure in Clause 14 of the guidelines for selection required site verification before interview, If the appellant had wrongly shown the lands of another somebody would have objected when the officials of the Corporation would have visited the land site. Learned Senior Counsel for the Appellant has aptly relied upon Sheo Dhayan Singh (supra) that in absence of any difference in the boundaries, the mention of the wrong plot number was an inadvertent error or misdescription holding as follows:--

7. We are of opinion that the present case is analogous to a case of misdescription. As already pointed out the area, the khata number and the boundaries all refer to Plot No. 1060 and what has happened is that in writing the plot number, one zero has been missed and 1060 has become 160. It is also important to remember that there is no plot bearing No. 160 in Khata No. 97. In these circumstances we are of opinion that the High Court was right in holding that this is a case of misdescription only and that the identity of the property sold is well established, namely, that it is Plot No. 1060. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. But where we have both the boundaries and the plot number and the circumstances are as in this case, the mistake in the plot number must be treated as a mere misdescription which does not affect the identity of the property sold. The contention of the appellants therefore with respect to this plot must fail.

14. We respectfully disagree with the learned Single Judge that the subsequent deed of correction dated 14.8.2012 was ipso facto a gross act of fraud and interpolation. Undoubtedly, it would have been better if the appellant, having discovered the fault committed by the Deed Writer obtained correction before submission. In view of the fact that he barely had three days in hand to apply, with correction not being possible within that time, obviously he acted in haste and over anxiety not to lose out the opportunity to apply and be considered by making a correction which he should not have made himself and should have better left to the Registration Authority. We therefore hold that there has been no

fraudulent interpolation by the appellant with regard to the plot number to obtain the advantage of a dealership by offering lands for which he had no lease agreement in his favour.

#### LAND SIZE

15. The advertisement mentioned a plot size with frontage and depth of 35 meters x 35 meters for the present location. The plot requirement varied for different locations as mentioned in the advertisement. Clause 1(b)(iii) of the advertisement reserved the right in the Corporation to consider the candidature even if there was variation in land measurement if NOC from the District Magistrate under the Petroleum Rules, Indian Road Congress Norms, License under the Explosives Act could otherwise be granted. Flexibility on the land size issue as a commercial decision was therefore reserved by the Corporation. The stipulation in the advertisement for the plot size was therefore directory and not mandatory. We had required the Corporation to place before us the original records. Alongwith his Lease Deed and other necessary documents, the Appellant submitted a hand drawn location map with the plot dimension shown as 35 meters x 35 meters on two sides only. It is not a map to scale. The officials of the Company on inspection before interview, as per the selection guidelines, found that the size of the plot actually was 35 meters at the back, on the left, frontage and 30 meters on the right hand side. They required the appellant to obtain a certification from the Revenue Authorities on scale with regard to the availability of the entire area which was confirmed on 3.12.2010. The Corporation was satisfied of the commercial suitability of the lands and viability for the establishment of a retail outlet. NOC under the Petroleum Rules, Indian Road Congress Norms and License under the Explosives Act has been granted.

16. We are of the opinion that the Appellant made no intentional misrepresentation with regard to land size to wrongly obtain a benefit different from the actual state of affairs. The site map submitted by him was not to scale. It was accompanied by a copy of the Lease Deed which mentioned the size of the leased area as 120 feet x 110 feet, which on conversion according to the respondent Corporation would come to 36.5 meters x 30.5 meters. Under the guidelines for selection the technical/commercial suitability of the land was decided by the Corporation after full application of mind. The consideration was not done on the basis that the plot size was 35 meters x 35 meters. The Corporation after site visit before interview, was of the opinion that the lands were commercially suitable and viable for establishment of the outlet. Respondent No. 7 lodged a complaint with the Ministry of Petroleum also which called for a report from the Oil Company which reiterated its commercial opinion leading to no further action. The comparative assessment for appointment between the Appellant and respondent no. 7 has to be left to the subjective discretion of the Corporation. There is no other allegation of ineligibility on part of the Appellant. No mala fides has been alleged against the Selection Committee or any procedural impropriety during consideration. It is not the jurisdiction

under Article 226 in the garb of judicial review to sit over the assessment of the Selection Committee.

Assessed on various parameters the Corporation has opined the Appellant to be better suited than respondent no. 7.

17. Learned Senior Counsel for the Appellant has aptly relied on Rama Shankar Misra (supra) for the distinction between misrepresentation and misdescription holding as follows:--

23. In case the petitioner had given true facts in the application for replacement of the vehicle, the application could not have been rejected. The mis-statement of facts has not therefore, in any way, affected the discretion which the Regional Transport Authority exercised or could exercise under the law while passing final orders on the above application. Such misstatement of facts will not in the eye of law amount to misrepresentation of fact can empower the Transport Authority to cancel the permit u/s 60 of the Act.

18. Fraud is a deliberate act done with conscious awareness of the illegality to derive an advantage which otherwise would not have been available but for such an act. Likewise misrepresentation made by positive wrong presentation or negatively by concealment with intention to mislead for securing a benefit which would otherwise not have been available but for such misrepresentation. Mere error in presentation or inadvertent misdescription cannot amount to fraud or misrepresentation. In Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, , it was observed as follows:--

20. 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's Third New International Dictionary 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 policy 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 Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation 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 a fact with knowledge that it was false. 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...

19. In the writ petition a bald assertion had also been made that the lands offered by the Appellant were unsuitable on account of a high voltage wire passing overhead. This did not find mention in the complaint filed by respondent no. 7 on 20.12.2010 which was only confined to the issue regarding dimensions of the lands. No materials in support of the former had been placed in the writ petition and nothing has been urged before us in that regard. Obviously being the second empanelled candidate, respondent no. 7 was indulging in adventurism making roving objections to dislodge the Appellant one way or the other.

20. The submission on behalf of respondent no. 7 that no reasons have been assigned by the Corporation for invoking the relaxation clause regarding the land measurement in favour of the Appellant does not appeal to us in absence of any requirement in the selection guidelines to record such reasons. In Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, it was observed as follows:--

18.....Unless the rules so require, the Selection Committee/Selection Board is not obliged to record reasons why they are not selecting a particular person and/or why they are selecting a particular person, as the case may be....

21. The decision to establish a retail outlet at a particular location and the comparative suitability of sites offered is essentially a commercial decision for which the Corporation is the best judge and the Court can hardly be said to be equipped for the same. Likewise the suitability of a candidate over another is again the subjective satisfaction of the Corporation with whom it desires to enter into contract. The Court exercising powers of judicial review shall only examine if the decision was taken in accordance with the advertisement and procedures for selection and not the final decision itself. The principle was succinctly explained in Tata Cellular Vs. Union of India, as follows:--

77. The duty of the court is to confine itself to the question of legality. Its concern should be:--

1. whether a decision-making authority exceeded its powers?
2. committed an error of law,
3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached, or
5. abused its powers.

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.

22. In *K. Vinod Kumar Vs. S. Palanisamy and Others*, the selection for LPG dealership was set aside inter alia on the ground of failure to give particulars of the land. Upholding the selection it was held as follows:--

7. The proceedings of the Dealer Selection Board must satisfy the requirements of a bona fide administrative decision arrived at in a fair manner. There are no mala fides alleged against the Dealer Selection Board or the President or any member thereof.....The appellant herein topped the list.

In the absence of a particular procedure or formula having been prescribed for the Board to follow, no fault can be found with the manner in which the proceedings were conducted by the Board. The Board is entrusted with the task of finding out the best-suitable candidate and, so long as the power is exercised bona fide, the Board is free to devise and adopt its own procedure subject to satisfying the test of reasonableness and fairness. There is no averment that the procedure adopted by the Board was arbitrary, unfair or unreasonable.

11. The law is settled that over proceedings and decisions taken in administrative matters, the scope of judicial review is confined to the decision-making process and does not extend to the merits of the decision taken. No infirmity is pointed out in the proceedings of the Selection Board which may have the effect of vitiating the selection process. The capability of the appellant herein to otherwise perform as an LPG distributor is not in dispute. The High Court was not, therefore, justified in interfering with the decision of the Selection Board and the decision of BPCL to issue the letter of allotment to the appellant herein.

23. The submission of the learned Senior Counsel for respondent no. 7 that the order in L.P.A. no. 71 of 2013 operated as res judicata giving finality inter parties is considered untenable, unacceptable and frivolous. The issue was of a consequential mandamus only. The principle of res judicata has no application. The judgments cited in this regard are not necessary to be dealt with. In view of our finding that there was no fraud by the appellant the case law relied also has

no application.

24. We therefore find it difficult to sustain the order under appeal and set aside the same. The appeal is allowed.