
(2014) 04 PAT CK 0053

In the Patna High Court

Case No : Letters Patent Appeal No. 647 of 2013

Narayan Singh

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : AIR 2014 Patna 115 : (2014) 2 PLJR 629

Hon'ble Judges : Vikash Jain, J;Navin Sinha, J

Bench : Division Bench

Advocate : Chitranjan Singh, Sr. Advocate and Siddhartha Prasad, Advocate for the Appellant; Anil Kumar Sinha, Gautam Kejriwal and K. Manish, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Navin Sinha, J.—The present Appeal arises from order dated 19.2.2013 dismissing C.W.J.C. No. 16270 of 2010. The learned single Judge held that if on account of subsequent developments, the earlier land site offered by respondent No. 8 for construction of godown to store LPG filled cylinders was no more suitable because of statutory restrictions, the respondent Corporation did not act arbitrarily in permitting change of the land site for the godown. Learned Senior Counsel for the appellant submitted that the advertisement itself stated that if the godown could not be constructed at the land site offered and on basis of which selection had been made, the distributorship granted would automatically stand cancelled. Respondent No. 8 after selection petitioned the respondent Corporation that the original land site offered by him was no more available as a school and house had subsequently been constructed in the vicinity. The Government authorities had therefore declined to grant No-objection certificate to enable Licence to be obtained from the Chief Controller of Explosives. An offer was made by respondent No. 8 for locating the godown at an available alternate site which was rejected by the respondent Corporation on 26.7.2011 by a

reasoned order after considering all aspects. Respondent No. 8 filed C.W.J.C. No. 14344 of 2011 questioning the rejection but withdrew the writ petition on 6.2.2012. Without any change in circumstances from the time of the earlier rejection, the respondent Corporation arbitrarily allowed the request for change of location subsequently on 11.1.2012. The industry policy guideline dated 14.11.2011 relied upon in justification, being a subsequent administrative decision cannot be given retrospective effect and cannot alter terms of the advertisement. Respondent No. 8 was being unduly favoured right from the inception of the selection process. There were other grave infirmities in his application sufficient to justify its rejection outright. The fact that investments may have been made and that the distributorship may have been commissioned were irrelevant factors if illegality and arbitrariness in grant of dealership was writ large. Reliance was placed on V. Purushotham Rao Vs. Union of India and Others, and M/s. Indian Oil Corporation Limited and Another Vs. Raj Kumar Jha and Others, .

2. Learned counsel for the respondent Corporation submitted that the land site originally offered by Respondent No. 8 had been considered suitable and letter of intent had also been issued. The selection process had been delayed because of certain complaints received requiring second round of interviews. In the meantime, a school and house came to be constructed in the vicinity of the lands originally offered by Respondent No. 8. The original land site was therefore no more available due to statutory restrictions in grant of No-objection certificate. The policy guidelines decided at the industry level on 14.11.2011 by the three national oil companies held that in such cases where the earlier land site was no more available because of statutory restrictions, change of land site would be permitted. The Corporation cannot be stated to have acted arbitrarily in reviewing its earlier administrative decision. It was a commercial decision taken in the best business interests. The eligibility of respondent No. 8 otherwise was not in dispute and neither was there any other irregularity alleged in selection process an issue. The industry level policy decision was also not under challenge.

3. Learned counsel for respondent No. 8 submitted that the original land site when offered and on basis of which selection had been made was available and approved for construction of the godown. The delay in selection led to intervening circumstances by construction of a school and house in the vicinity in the year 2009/2010. Statutory restrictions now prohibited grant of No-objection certificate with regard to the lands. Representation was therefore filed before the Corporation to permit construction of the godown at alternate available location suitable according to the requirements of the Corporation. The new land site had been found suitable. No-objection certificate had been granted by the District authorities and pursuant to which Licence had also been granted by the Chief Controller of Explosives. The respondent had made investment in construction of the godown and the distributorship was operational since June 2013. A letter of intent having been issued to the respondent, a contract had come into being between him and the respondent Corporation. The Corporation has not acted

arbitrarily, in the facts of the case by accepting an alternate location permissible by a policy decision. There is no challenge to the policy decision. It would be against justice and equity to now cancel the distributorship. Reliance was placed on Brihan Mumbai Electric Supply Transport Undertaking and Another Vs. Laqshya Media P. Ltd. and Others, ; Smt. Moumita Poddar Vs. Indian Oil Corporation Ltd and Another, and Brajesh Chandra Mishra Vs. The Union of India (UOI) and Others, and C.W.J.C. No. 2240 of 2012 (M/s. S.C.I. India Ltd. v. State of Bihar). There were no issues for mala fides or any other irregularity in selection process as the appellant gave up all such claims including any claim for appointment as the next empanelled candidate, as noticed in the order under appeal. The Appellant earlier also had unsuccessfully challenged the selection of the Respondent in C.W.J.C. No. 7559 of 2010.

4. We have considered the submissions on behalf of the parties. The respondent Corporation published an advertisement on 17.10.2007 for grant of LPG distributorship inter alia at Madhubani in the District of Madhubani. Clause 13.1 of the advertisement provided that availability of godown for storage of filled cylinders approved by the Chief Controller of Explosives was necessary. Clause 14 of the advertisement provided that the godown had to be constructed at the location offered on basis of which the selection was made. No change of land site was to be permitted at subsequent time. If the lands were not found suitable for construction of a godown, or Licence was not granted by the Chief Controller of Explosives, the distributorship would automatically stand cancelled. Clause 19(a) provided that the Company in its wisdom reserved the right to cancel/recall/modify the advertisement including extension of date for submission of applications. Clause 9 of the guidelines for selection reiterated the conditions in the advertisement regarding the land site.

5. Interviews were first held on 12.1.2009. On account of certain complaints having been received, fresh interviews were held on 21/22.9.2009. The candidature of the first empanelled candidate was cancelled on 7.4.2010. Respondent No. 8 was the 2nd empanelled candidate and the Appellant was at serial 3. The lands originally offered by respondent No. 8 were found to be suitable by the Corporation and Letter of intent was issued to him on 7.10.2010. In between this period by subsequent events, the original land site offered was no more available for construction of the godown due to statutory restrictions by reason of a School and house having been constructed in the vicinity. It must be appreciated that the original land site had not been wrongly or incorrectly offered, ineligible for grant of No-objection certificate or Licence from the Chief Controller of Explosives from the very inception stage. The land site was still available. But on account of statutory restrictions under the law construction of a godown on it was no more permissible. This event was not attributable to Respondent No. 8 and was a situation not visualized under the advertisement. The advertisement, as noticed did contain a relaxation Clause. But relaxation or modification could be done for justified reasons in the law and not arbitrarily.

6. A show cause notice was issued to respondent No. 8 on 26.7.2010 followed by reminders on 10.12.2010 and 10.1.2011 to expedite construction of the godown. Respondent No. 8 represented on 14.3.2011 that due to passage of time and intervening developments, the original land site was no more suitable as a school and a residential house had been constructed adjacent. Simultaneously, alternate lands readily available meeting the requirement of the Corporation was offered. Another representation was filed by respondent No. 8 on 11.4.2011 enclosing necessary communications from the District authorities regarding statutory restrictions in construction of the godown at the original location. The respondent Corporation rejected the request for alternate location on 26.7.2011, referring to clause 14 of the advertisement and the letter of intent that change of land site was not permissible and in the event of non-availability of the original land site the offer would stand withdrawn. He was required to obtain the necessary statutory approvals within 15 days failing which the letter of intent would be withdrawn.

7. Respondent No. 8 then filed C.W.J.C. No. 14344 of 2011 on 29.8.2011 challenging the communication dated 26.7.2011 refusing change of land location. While the writ petition was pending, he filed another representation on 26.7.2011. The respondent Corporation on 11.1.2012 referring to an industry level policy decision permitted change of land site as the earlier site was no more available due to statutory restrictions. This policy decision was never specifically challenged by the appellant or alleged to be non-existent. A mere challenge to the letter dated 11.1.2012 in general will not suffice. During the hearing of the Appeal we asked the Counsel for the Corporation to produce before us a copy of the policy decision. The policy decision dated 14.11.2011 signed by senior representatives of the three national oil companies has been placed before us copies have of which have been supplied to the Counsel for the parties. It expressly permits change of land site if the earlier location was no more suitable due to statutory restrictions, also referring to an order of the Andhra Pradesh High Court in Writ Petition No. 1848 of 2010 (M/s. Himaja Indane, Chitoor District v. The Chief Area Manager, Vijaywada) relatable to the present Corporation itself.

8. Respondent No. 8 withdrew his writ petition on 6.2.2012. No-objection certificate has been granted by the District administration on 25.1.2012 under Rule 144 of the Petroleum Rules, 2002 and Licence from the Chief Controller of Explosives has also been granted on 21.3.2012 for the new location under the Liquefied Petroleum Gas (Regulation of Supply and Distribution) Order, 2000. The distributorship is stated to have been commissioned in June, 2013.

9. The Appellant expressly gave up challenge on any other issue regarding the selection process acknowledging that he had no claim for appointment as the third empanelled candidate. There was no other claimant. The Corporation took an administrative decision to reject the request for change of location made earlier by Respondent No. 8. In our opinion, given the facts of the case, the

industry level policy decision was certainly a relevant consideration for review of what was essentially an administrative decision. Despite being aware of the policy decision mentioned in the letter dated 11.1.2012, the appellant had never questioned the same. In the facts of the case, there being no other claimant to distributorship setting aside the selection of respondent No. 8 on the ground that the policy decision would have prospective effect only shall serve no useful purpose and only entail unnecessary exercise for a fresh selection process. We do not find the policy decision to be arbitrary, illogical or irrational. It is issue specific and is based on sound reasoning, protects the interest of both the selected candidate and the Corporation for what were essentially events beyond the control of both. If the original land site was no more available due to intervening circumstances leading to statutory restrictions not attributable to the selected candidate it can also be considered a prudent commercial decision by the respondent Corporation satisfied otherwise of the competency of the candidate. The Corporation, being a "State" under Article 12 of the Constitution, but participating in a commercial activity has to be permitted some play in the joints or flexibility in commercial interests.

10. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, it was observed as follows:

12. ...Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

11. In *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, explaining the principle for judicial review of Government action it was observed:

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

12. The facts in *M/s. Himaja Indane (supra)* were markedly similar. The only difference being that the earlier land site was no more available subsequently on account of restriction in land use zones. Similar defence was taken by the very present respondent Corporation negated by the Court.

13. In *Smt. Moumita Poddar Vs. Indian Oil Corporation Ltd and Another*, relied upon on behalf of the Appellant, the selection for grant of dealership was held to be procedurally flawed. But considering that the other claimants were not interested, the Appellant had already made investments and was running the

dealership, taking into consideration the subsequent developments it was held as follows:--

44. The facts and circumstances of this case are not such where this Court would be reluctant to come to the aid of a selected candidate, against whom there are no allegations of manipulation or any undue favour having been shown to her. In our opinion, this is not a case of such an exceptional nature where equitable considerations would be impermissible. The peculiar facts of this case are such that it would be appropriate for the Court to take into consideration the subsequent events, in order to do complete justice between the parties. In *Kedar Nath* (2004 AIR SCW 5789) this Court delineated the circumstances in which the subsequent events could be taken into consideration in the peculiar facts and circumstances of a particular case. It was emphatically observed as follows:

16. In our opinion, by not taking into account the subsequent event, the High Court has committed an error of law and also an error of jurisdiction. In our judgment, the law is well settled on the point, and it is this: the basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the court to consider changed circumstances. A court of law may take into account subsequent events inter alia in the following circumstances:

(i) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or

(ii) it is necessary to take notice of subsequent events in order to shorten litigation; or

(iii) it is necessary to do so in order to do complete justice between the parties.

14. *V. Purushotham Rao Vs. Union of India and Others*, relied upon on behalf of the Appellant was distinguished in *Smt. Moumita Poddar Vs. Indian Oil Corporation Ltd and Another*, as follows:

43. In our opinion, the aforesaid judgment in *V. Purushotham Rao* case was rendered under some very peculiar and exceptional circumstances. It was a case where allotment of retail outlets of petroleum products had been made by a Minister in violation of all norms while exercising his discretionary powers for making the allotments. These allotments had been made in the absence of any guidelines....

15. In *Raj Kumar Jha* (supra) also relied upon on behalf of the Appellants the issue related to rejection of an application by a candidate not in conformity with the advertisement. The adherence to the conditions of the advertisement was emphasized in that context. It has no relevance to the issue in the present controversy.

16. We therefore find no reason to interfere with the order under appeal.

17. The Appeal is dismissed.

Vikash Jain, J.

I agree.