

(2004) 11 OHC CK 0023
In the Orissa High Court
Case No : O.J.C. No. 2479 of 2001

Om Prakash Agrawal

APPELLANT

Vs

Bharat Petroleum Corporation and Others

RESPONDENT

Date of Decision : 11-11-2004

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2005 Ori 64

Hon'ble Judges : A.K. Patnaik, J;A.K. Parichha, J

Bench : Division Bench

Advocate : H.S. Mishra, for the Appellant; S.D. Das, (for Nos. 1 and 2), N.R. Rout, (for No. 3) and Sanjit Mohanty, (for No. 4), for the Respondent

Judgement

A.K. Parichha, J.—Petitioner has filed the present writ petition challenging the actions of opposite party Nos. 1 to 3 appointing opposite party No. 4 as the dealer for the Company owned retail outlet of Bharat Petroleum Corporation at Attabira in the district of Bargarh. Opposite party No. 1-Bharat Petroleum Corporation Ltd. (hereinafter referred to as "the Corporation") which is a Government of India Enterprise and is controlled and financed by the Government of India, proposed to open Company owned retail outlets at different places including Attabira town in the district of Bargarh and issued advertisement in the daily local news paper "The New Indian Express" dated 25-8-2000 inviting applications from eligible physically handicapped candidates. In response to the said advertisement, several physically handicapped persons including the petitioner and opp. parties 4 and 5 submitted applications with the required information and documents. After scrutiny of the applications, the Dealer Selection Board comprising of the Chairman opp. party No. 3 and two members interviewed the candidates and submitted a report to opp. party No. 1 Corporation recommending a panel of three names in order of merit; opp. party No. 4 being the first, opposite party No. 5 being the second and the present petitioner being the third. The Corporation then made necessary field verification and found opp. party No. 4 to be the most suitable candidate for appointment as

dealer for the Company owned out-let at Attabira and accordingly issued the offer letter, which was accepted by opp. party No. 4. Aggrieved by the said selection and appointment, the petitioner has filed the present writ petition praying for issue of a writ of mandamus directing opposite party Nos. 1 to 3 to declare him as the most suitable candidate and to appoint him as the dealer for the company owned outlet at Attabira in place of opp. party No. 4.

2. The submission of the petitioner is that the Dealer Selection Board (in short, "the Board") acted in a manner contrary to the terms and conditions of the advertisement and it did not adopt fair process in the selection. It is alleged that the Chairman of the Board-opp. party No. 3 harbours strong prejudice against the community to which the petitioner belongs and because of this prejudice he recommended opposite party No. 4 as the most suitable candidate, although the petitioner was the preferential candidate being the resident of the district in which the retail outlet situates. The petitioner has also challenged the norms adopted by the Board calling it ultra vires the Constitution.

3. Opposite parties 1 and 2 in their joint counter-affidavit while denying the allegations of the petitioner have maintained that the selection of the dealer for the company owned retail outlet at Attabira was made in accordance with the terms of the advertisement and the guidelines issued by the Ministry of Petroleum and Natural Gas, Govt. of India. They have averred in clear terms that after scrutiny, interview and field verification opp. party No. 4 was found to be the most suitable candidate and was accordingly appointed as the dealer for company owned Attabira retail outlet. According to them, the petitioner has filed the present writ petition with a mala fide intention to somehow stall the appointment of opp. party No. 4 as the dealer for Attabira outlet after being unsuccessful in his attempt to be so appointed. They have categorically denied any illegal or mala fide action on the part of the Selection Board or the Corporation.

4. Opposite party No. 3 in his separate counter-affidavit stoutly denied all the allegations of the petitioner and submitted that the terms of the advertisement, the guidelines issued by the Ministry of Petroleum and Natural Gas in Memorandum dated 9-10-2000 and the amendments thereto were strictly followed by the Board while selecting the candidates for the outlets including the retail outlet at Attabira. He also submitted that as per Clause 3.10.1 of the aforesaid Memorandum of the Ministry of Petroleum and Natural Gas for selection of the dealers several criteria are to be taken into consideration and marks have to be given for each criterion to each candidate by the Chairman and each of the members of the Selection Board separately and the three candidates securing the highest aggregate marks out of total marks of 400 are to be kept in the panel in order of merit. Opposite party No. 3 has asserted in the counter-affidavit that while interviewing the candidates for the company owned Attabira outlet, the Chairman and each member of the Selection Board awarded marks to the candidates on each criterion and basing on the total marks so awarded the merit

list was prepared and forwarded to opp. party No. 1. Opposite party No. 3 has stoutly denied the allegations that he harbours any prejudice against the community to which the petitioner belongs and he deliberately awarded less marks to the petitioner. According to him, the allegations raised by the petitioner against him are malicious and scandalous in nature for which the petitioner should be legally prosecuted and punished.

5. Opposite party No. 4 in his counter -affidavit has also refuted all the allegations of the petitioner and has contended that the dealer selection was done in a fair manner. He has also refuted the claim of the petitioner that the petitioner is a preferential and better candidate than him. Opp. party No. 6 supported the stand taken by opposite party Nos. 1 and 4 and claimed that the guidelines issued by the Ministry are not ultra vires the provisions of the Constitution.

6. Clause 2 of the advertisement under Annexure 1 stipulates the eligibility conditions. Clause 2(d) states that resident of any one of the districts of Bargarh, Naupada, Bolangir, Sambalpur and Jhursuguda districts could apply for the retail outlet located at Attabira and that other things being equal, preference is to be given to the residents of the district for which dealership is advertised. According to Mr. H. S. Mishra, learned counsel for the petitioner, the petitioner being the only candidate belonging to the district of Bargarh out of the panel of candidates recommended by the Board, he should have been selected as dealer for the retail outlet at Attabira as the preferential candidate. Mr. Mishra further submits that the guidelines prevailing at the time of advertisement contemplated that on completion of the interview, result would be displayed on the Notice Board giving three names included in the merit panel in the alphabetical order and that it nowhere required the Board to prepare the panel of successful candidates in order of merit. According to him, all the candidates of the merit panel stand on equal footing and so preferential clause and field report should decide which of the candidates of merit panel would be appointed as the dealer. His allegation is that the Board acted against the guidelines and the settled procedure by preparing a merit list indicating the positions of the candidates. Mr. Mishra also challenges the vires of the guideline, which confers the power on the Chairman to award 200 marks as against 100 marks to each of the members of the Board. According to him, giving power of 200 marks to the Chairman himself virtually makes the Chairman the sole authority to select a dealer and renders the role of the two members meaningless. His further allegation is (hat the Chairman of the Board deliberately gave low marks to the petitioner in the interview thereby reducing his position in the merit list, because he is averse to the community to which the petitioner belongs.

7. Mr. S. D. Das, learned counsel appearing on behalf of opp. party Nos. 1 and 2, on the other hand, submits that the scrutiny of the applications and documents, the interview of the candidates by Selection Board, the publication of the result of the interview and the field verification were all done according to the terms of

the advertisement and the guidelines prescribed in the Memorandum of the Ministry of Petroleum and Natural Gas, Govt. of India and absolutely no irregularity or illegality was committed by the Selection Board or the Corporation. He supports the stand of opp. party No. 3 that the selection of opp. party No. 4 as the dealer for the company owned retail outlet at Attabira was done in a fair manner and was not tainted with any illegality, malice, or irregularity.

8. Mr. N. R. Rout, appearing for opp. party No. 3 submits that the Board is an impartial body with a retired Judge of the High Court or a retired District Judge as Chairman and one Officer not below the rank of Deputy General Manager or Chief Manager of the concerned Oil Company and an officer of the same rank of another Oil Company as members, and so any kind of prejudicial or mala fide action by it is unthinkable. He submits that marks are awarded by the Chairman and each member of the Selection Board to each candidate on different criteria then and there at the interview and the total marks secured by a candidate decides his position in the panel. Mr. Patnaik specifically submits that the files and documents of the Selection Board would show that the interview of the candidates was done in a fair and proper manner and that each member of the Selection Board gave specific marks on each criterion to each of the candidates and because opp. party No. 4 secured highest total marks he was kept at the top of the merit panel. Mr. Patnaik denies the allegation that the Chairman of the Selection Board was prejudicial towards the community to which the petitioner belongs and demands that for such defamatory allegation the petitioner should be legally proceeded against.

9. Learned counsel for opp. party No. 6 produced the files relating to the interview and selection of candidates for the company owned retail outlet at Attabira and supported the selection of opp. party No. 4 as the dealer. Mr. Sanjit Mohanty, learned counsel for opp. party No. 4 also supported the stand taken by the learned counsel for opp. parties 1 to 3 and submitted that preferential condition given in the advertisement is applicable only if all the candidates named in the merit panel secure equal marks. Regarding the interview and marking pattern, his argument is that when the Memorandum issued by opp. party No. 6 clearly postulates that the Chairman would have power to award 200 marks and each member 100 marks, such guideline has to be followed by the Selection Board while interviewing the candidates. He submits that the guideline cannot be termed as unreasonable or discriminatory as it contains no unreasonable provision. According to him, the Chairman being a retired Judge, is given more power in the matter of awarding marks to ensure fair selection and to overcome any possible prejudice of favouritism by any of the members who are the officers of the Oil Companies. Mr. Mohanty further argues that the petitioner having participated in the selection process without raising objection at that time is now estopped from challenging the said process. In this connection, he relies on the case laws reported in *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, and *National Institute of Mental Health and Neuro Sciences Vs. Dr. K. Kalyana Raman and others*, . No specific argument was offered on behalf of the

opp. party No. 5.

10. From the submissions of the learned counsel for the respective parties the following points emerge for consideration :

(i) Whether the selection process of the dealers undertaken by the Oil Company and Dealer Selection Board is ultra vires ?

(ii) Whether the petitioner having participated in the selection process is now estopped from challenging selection process?

(iii) Whether the decision of the Dealer Selection Board in the matter of selection of dealer for retail outlet at Attabira was tainted with any prejudice or malice ?

(iv) Whether the petitioner is entitled to be appointed as dealer for the retail outlet at Attabira as the only preferential candidate ?

11. In paragraph 19 of the writ petition the petitioner has alleged that although the guideline provides that the Chairman of the Board should be a retired Justice of the High Court, the Chairman of the Selection Board which conducted selection of the dealer for the retail out-let of Attabira was not a retired Judge of the High Court and therefore, the constitution of Selection Board is illegal and the selection made by such Selection board is also illegal and liable to be quashed. In this connection it is worthwhile to refer to the Clause 3.5.2 of the Office Memorandum dated 9th October, 2000 issued by the Ministry of Petroleum and Natural Gas, Govt. of India which reads thus :

"Selection of dealers/distributors of the Oil Company will be made by the duly constituted Dealer Selection Board. Even Board will consist of-- (i) a retired Judge of the High Court/retired District Judge-Chairman; (ii) An Officer of the concerned Oil Company not below the rank of Deputy G. M. or Chief Manager depending on availability-Member; (iii) An officer of the another Oil Company not below the rank of Deputy G. M. or Chief Manager depending on availability -- Member".

Further more, in the guideline issued by the Ministry of Petroleum and Natural Gas, Govt. of India dated 5th January, 2001 amendment to paragraph 3.5.2 was effected and it was clarified that a retired Additional District Judge will also be eligible for appointment as Chairman of the Dealer Selection Board. In view of Clause 3.5.2 and the amendment thereto a retired District Judge or a retired Addl. District Judge is also eligible to be the Chairman of the Board. In the present case the Chairman-opp. party No. 3 was a retired District Judge and so the constitution of the Board was in no way illegal.

12. In paragraph 20 of the writ petition the petitioner has alleged that conferring the power on the Chairman to award 200 marks as against the power of each member to award 100 marks is discriminatory, illegal and ultra vires. According to him, such procedure gives unfettered discretion to the Chairman to select any candidate of his choice.

13. In Clause 4 of the guideline dated 5th January, 2001 issued by the Ministry of Petroleum and Natural Gas, Govt. of India specific instruction is there that the Chairman of the Dealer Selection Board at the time of evaluating the candidates would award 200 maximum marks while the other members would continue to award the candidates 100 maximum marks each and the candidates are to be selected on the basis of the marks obtained out of the total 400 marks. Thus, the guideline of the Ministry is clear that out of the total 400 marks the Chairman would have the power of awarding maximum 200 marks. The question is whether this guideline is violative of Article 14 of the Constitution.

14. A selection committee should essentially be an independent and impartial body constituted for selection of candidates for a particular post or particular vacancy and so while making the selection it must adopt procedural fairness. Once such Committee adopts a mode of selection, which is fair and transparent, procedural fairness can be inferred. In the case of K. Vinod Kumar Vs. S. Palanisamy and Others, it was said that when a procedure or guideline is provided for making the selection, the Selection Board has to follow the procedure or guideline. If no procedure has been prescribed, then the Selection Board is free to devise its own procedure, which satisfies the test of reasonableness. In the instant case, clear procedure and guidelines have been issued by the Ministry of Petroleum and Natural Gas, Govt. of India for selection of dealer for the retail outlets and in the guideline it has been categorically indicated that the Chairman would have the power of awarding maximum 200 marks as against the power of each member to award maximum 100 marks. The Selection Board followed this guideline while making the selection of dealers. Clause 3.5.2 of the memorandum provides that a retired Judge would be the Chairman and two Senior Officers of Oil Companies would be the members. Since the Chairman is a total outsider and independent person having a judicial background, the Ministry probably thought it proper to give him the power of awarding more marks than the members to ensure fair selection of the dealers. It is to be noted that the same guideline was followed for all the candidates facing the interview and the Chairman and each of the members awarded highest marks to opposite party No. 4. So the guideline empowering the Chairman with the power of awarding more marks cannot be termed as ultra vires or unfair.

15. Learned counsel for opp. party No. 4 submits that the petitioner having participated in the selection process is now estopped from challenging the said process. In support of this submission, he relies on the case of Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, . In that case the petitioner appeared in an examination without protest. Subsequently, realizing that he would not succeed, he filed a writ application challenging the validity of the examination alleging that it was not conducted as per law. A three-Judge-Bench of the Apex Court ruled that the petitioner is estopped from challenging the validity of the competitive examination after appearing in the examination and taking a chance. Similar view was also expressed by the Apex Court in the case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, In that

case the petitioner appeared in the interview and took his chance, but after he was declared unsuccessful in the interview, he challenged the interview as unfair. Their Lordships observed that after taking calculated chance in the interview the petitioner cannot challenge the legality of the interview. In the present case the petitioner did not challenge the selection procedure before the interview and appeared in the interview. Thus, he took a calculated chance. But when he was not selected as the dealer for Attabira outlet, he filed the writ petition alleging that the selection procedure is illegal and ultra vires. In view of the ratio laid down by the Apex Court in the above noted cases, the petitioner is now estopped from challenging the legality of the selection procedure adopted by the Board.

16. The petitioner has made an allegation that the decision of the Dealer Selection Board in the matter of selection of dealer for retail outlet at Attabira was tainted with prejudice and malice. It is claimed that the Chairman of the Board had personal prejudice against the Marwadi community to which the petitioner belongs and, therefore, he deliberately awarded more marks to opp. party No. 4 and less marks to the petitioner. This allegation was stoutly denied by opp. party No. 3 in his counter affidavit. There is nothing on record except the statement of the petitioner to substantiate the above noted allegation. However, in order to find out whether the interview was conducted in a fair manner, the file relating to the interview and selection of dealer for the retail outlet of Attabira was called for and was produced. On perusal of the said file, it is seen that the Chairman and each of the members of the Selection Board have given marks to each of the candidates item-wise in accordance with the guidelines given in Clause 3.10.1 of the memorandum issued by the Ministry of Petroleum and Natural Gas and these mark-sheets reveal that not only the Chairman, but each of the members has awarded more marks to opp. party No. 4 than the petitioner, which suggests that the marks awarded by the Chairman was not tainted with any prejudice or malice. From the above noted facts and circumstances, we find no substance in the allegation of the petitioner that the selection of opp. party No. 4 as dealer of Attabira retail outlet was tainted with malice and prejudice.

17-18. The petitioner claims that out of the candidates in the merit panel prepared by the Board, he is the only candidate belonging to Bargarh District in which the retail outlet of Attabira situates and so, according to Clause 2(d) of the advertisement dated 25-8-2000 issued by opp. party No. 1, he should be selected as dealer for the said outlet. Mr. H. S. Mishra, learned counsel for the petitioner submits that all the candidates of the merit panel stand on equal footing and so preference should be given to the candidate who is the resident of the District for which the dealership is advertised. As against this, Mr. Das, learned counsel for opp. parties 1 and 2 and Mr. Mohanty, learned counsel for opp. party No. 4 argue that the preferential Clause noted in 2(d) of the advertisement can come into play only when all the candidates of the merit panel secure equal marks. clause 2(d) reads as follows :

"2. Eligibility -- Applicant should be (a), (b) and (c) xx xx xx

(d) Resident of any one of Bargarh, Nuapada, Bolangir, Sonepur, Sambalpur and Jharsuguda districts in the State. However, other things being equal, preference will be given to the residents of the district for which dealership is advertised."

So the preferential clause can have application only if the candidates stand on the same footing in all aspects. As is seen from the mark-sheets of the selection file, opp. party No. 4 has secured a total of 283 marks as against 241 marks secured by the petitioner. Each member including the Chairman has given better rating to opp. party No. 4 in personality, business ability, salesmanship capability to arrange finance, general level of intelligence, capability to provide infrastructures and facilities and also in general assessment. The field verification report is also there in favour of opp. party No. 4. Under such circumstances, it cannot be said that all the aspects were equal between the petitioner and opp. party No. 4. When the petitioner does not stand on equal footing with opp. parties 4, the preferential clause noted in Clause 2(d) of the advertisement will not come to his help and he cannot claim dealership of Attabira outlet on preferential basis.

19. We are therefore of the considered opinion that the selection process adopted by the Board was neither illegal nor violative of Article 14 of the Constitution and that the decision of the Board was not tainted with any prejudice or mala fide. We are also of the opinion that the interview and selection were done by adopting fair procedure. We, therefore, do not find any good reason either to quash the appointment of opp. party No. 4 or to direct appointment of the petitioner as dealer of the Attabira outlet. Consequently, the writ application fails and is dismissed and the interim order dated 6-5-2004 also stands vacated.

A.K. Patnaik, J.

20. I agree.