

(1999) 08 OHC CK 0001
In the Orissa High Court
Case No : O.J.C. No. 6596 of 1999

Priti Oil Ltd. and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 31-08-1999

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2000 Ori 1

Hon'ble Judges : P.K. Mishra, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : Gangadhar Rath, B.R. Sarangi, B.C. Mohanty, A.K. Parija, S.P. Sarangi and P.P. Mohanty, for the Appellant; J. Das, R.K. Mohapatra, N.C. Panigrahi and Ganeswar Rath, for the Respondent

Final Decision : Allowed

Judgement

Patnaik, J.—In the present writ petition, the petitioner a limited company engaged in the business of extraction of oil from oil seeds in its plant situated at Rengali in Sambalpur district assails the Government order dated 28-5-1999 (Annexure 8) as arbitrary and discriminatory in appointing the Orissa State Co-operative Marketing Federation (for short, the "MARKFED") as the agent and the opposite party No. 6, M/s. Hanuman Vitamin Foods Limited, as the Raw Material Procurer [hereinafter referred to the "RMP") for collection of Sal seeds during the year 1999 crop year ignoring its claim for such appointment.

2. Its case is, prior to 1995 under the Sal Seed Policy of the State Government, the Tribal Development Co-operative Corporation (for short, the TDCC") and the Orissa Forest Development Corporation (for short, the "OFDC") were the agents for collecting the Sal seeds through tribal inhabitants on pay-merit of wages. The Sal seeds so collected used to be put to public auction inviting tenders. In the year 1995, the Government found that oil extracting plants in Orissa were being affected for Inadequate supply of Sal seeds and brought out a policy that all such oil extracting units would be appointed as the RMP under the OFDC and TDCC.

Under this policy these Corporations were allotted different forest areas for collection. The RMPs were required to pay commission to the agents and royalties to the Government at a fixed rate. The object of this RMP policy in the year 1995 was with a view to ensure availability of raw materials to the plants of Orissa for their survival, general, and employment as well as for augmenting Government revenue by way of royalty and sale-tax and also ensuring certain income to the aforesaid two Corporations by way of fixed margin without any capital investment by the said Corporations. Accordingly to the petitioner, this RMP policy was introduced which proved to be effective and also gave desired result. For this Government was assured of royalties atleast 75% of the estimate crop but, in fact, such royalty also sometimes went upto 600 to 800 per metric tonnes. The OFDC and the TDCC used to get fixed margin of 150 per metric tonnes without any investment. The State also used to collect sales-tax through the two Corporations.

3. When the position stood thus, the Government by the impugned order (Annexure 8) appointed the OFDC and the TDCC as the agents for eleven forest divisions to each named in the notification and the MARKFED was appointed as the agent for the remaining five forest divisions namely Keonjhar, Bamara, Deogarh, Nawarangpur and Jeypore. The opposite party No. 6 M/s. Hanuman Vitamin Foods Limited was appointed as the RMP for the divisions allotted to MARKFED. It is alleged that the petitioner's case was illegally ignored. Such appointment of M/s. Hanuman Vitamin Foods Limited as RMP is only with the purpose of facilitating the company for earning unlawful gains by way of individual monopolistic trade which violated Article 16(6) of the Constitution and thus a colourable exercise of the administrative powers of the State.

It is the petitioner's case that though for the year 1999 crop year it made an application for such appointment as RMP which work it was doing since 1995 after the RMP policy of the Government, yet it was not given the privilege because of discrimination and arbitrary act of the Government. It is further claimed that as per the provisions of the Orissa Sal Seed (Control of Trade) Act, 1981 and the Rules thereof, the MARKFED did not make any application nor at any time it was the agent of the Government, or worked as a RMP, nor it has got any infrastructure. The appointment of the MARKFED as an agent of the Government and the appointment of opposite party No. 6 as the RMP under the MARKFED is wholly an arbitrary action which has to be struck down. The petitioner further claim that it had a legitimate expectation for such appointment inasmuch as it has been procuring the oil seeds since 1995 and being encouraged by the Government policy decision engaging RMP the company upgraded its machinaries by investing huge amount and this is only because of the promise of the Government and therefore the State is bound by the principle of estoppel to engage the petitioner as the raw material procurer.

4. Opposite party No. 1, the State of Orissa and opposite parties 5 and 6 have filed separate counter affidavits.

The State took the stand that there has been no illegality in appointing the MARKFED as its Agent and opposite party No. 6 as the RMP and the decision is in public interest and also for the interest of the primary collectors who are tribal people of the locality. It is the further stand of the Government that the impugned order of the Government under Annexure 8 does not deprive the petitioner from its right to purchase Sal seeds as the raw material either from the OFDC or the TDCC. The petitioner cannot claim as of right to carry on the trade or business with Government as its fundamental right when It is for the Government who has got right to enter into contract with any particular person or persons.

With regard to appointment of MARKFED as an agent its stand is, this is a State Government undertaking which has solvent extraction plant at the Co-operative sector at Bargarh which was running at a loss and is a sick unit. The MARKFED for revival of its Bargarh unit leased out the same to opposite party No. 4 for five years on term and conditions as per the agreement. On the basis of the recommendation of the Co-operation Department opposite party No. 6 was appointed as the RMP for the first time in the year 1997. This opposite party No. 6 was responsible for reviving the unit at Bargarh. It is on the request of the MARKFED that Government engaged opposite party No. 6 as the RMP for the current year also.

5. The written statements of opposite parties 5 and 6 are also in the same line as that of the Government. Mentioning the facts pleaded separately by them would be an idle exercise by way of repetition.

6. Mr. Gangadhar Rath, learned Senior Counsel for the petitioner) in support of the case of the petitioner advanced extensive arguments touching on various legal points which are disposed of as indicated below.

Mr. Rath made a scathing attack against the appointment of opposite party No. 5, the MARKFED as Agent on the following grounds :

It was urged that Rule 3 of the Orissa Forest Produce (Control of Trade) Rules, 1983 requires the Government to publish in the official gazette in such manner a notice inviting applications for such appointment of agents indicating the terms and conditions of the agency. Sub-rule (7) of the Rules prescribes that notwithstanding anything contained in these rules, Government can appoint any person as an agent without publication of such notice only when Government is of the opinion that it is expedient and necessary to do so may for the reasons to be recorded in writing appoint a co-operative society, a Grama Panchayat, O.T.D.C. , O.F.D.C. or any other Government undertaking as agent. Referring to para 12 of the judgment of the apex Court in the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, it was submitted that even though the MARKFED is a State within the meaning of Article 12 of the Constitution, it cannot be equated with the State and is not a State for the purpose of other provisions of Part III of the Constitution.

Secondly, it was urged that the appointment of the MARKFED as an agent is mala fide since, according to the learned counsel, Government instead of retaining for itself the monopoly trade in the Sal seeds, by appointment the MARKFED as the agent in a camouflaged manner facilitated opposite party No. 6 the earning of the entire profits from the business and by this, the State has lost a huge profit. In this regard it was pointed out that by paying only rupees one lakh per month to the MARKFED, the opposite party No. 6 would enjoy the utilisation of the whole of the Sal seeds and gain huge profits and this is in utter violation of the law laid down in the case of Rashbihari Panda etc. Vs. State of Orissa, which followed the case of Akadasi Padhan Vs. State of Orissa, . Mr. Rath also referred to the decision in the case of Jagadish Patel Vs. Patel Tobacco Co. and G.C. Sankar, .

Thirdly, it was submitted that non-consideration of the case of the petitioner was arbitrary, discretionary and violative of the provisions of Article 14 of the Constitution.

7. Mr. Ganeswar Rath, learned counsel for the MARKFED, opposite party No. 5 strenuously urged that , it is nowhere the case of the petitioner that it was at any time a competitor for appointment as an agent and, therefore, it has no locus standi to challenge the appointment of the MARKFED as an agent. The petitioner and the MARKFED do not stand on the same footing. Therefore, it cannot claim equal treatment by the State and cannot advance a case of violation of equality clause under Articles 14 and 16 of the Constitution of India.

We are unable to accept this counter argument of the learned counsel for the MARKFED.

Mr. Rath, learned counsel for the petitioner, on the other hand, drew attention to the grounds of the writ petition and submitted in support of the grounds that the petitioner has also challenged status of the MARKFED as a mere name lender and appointment of opposite party No. 6 by the State as a RMP is to create an individual monopoly through the MARKFED.

Having heard learned counsel for both sides, and on going through the agreement between the MARKFED and opposite party No. 5 we are of the view that the petitioner could challenge the appointment of the MARKFED on the ground of mala fide. The contention of Mr. Rath, learned counsel for the MARKFED, is therefore rejected.

8. Mr. Mohapatra, learned counsel for the opposite party No. 6, relied on several decisions touching the matter of Government's administrative action and the principle laid down for judicial review of such action. It would be idle to deal with those decisions, but sufficient to deal with the cases reported in Tata Cellular Vs. Union of India, , and Krishnan Kakkanth Vs. Government of Kerala and others, .

Relying on paragraphs 85 to 113 of the judgment in the case of Tata Cellular (supra) it was submitted that, in case of contractual powers of the State or an

authority of the State, the Court can review the action. If there is any arbitrariness or favouritism, but it must be clearly stated that there are inherent limitations in exercise of that power of Judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. There will be no question of infringement of Article 14 of the Constitution if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power, but if the same power is exercised for any collateral purpose the exercise of that power will be struck down". In this context Mr. Mohapatra, referring to para 90 of the judgment of the said case, submitted that "the judicial review is not permissible to judge as to what the decision has been taken but as to how the decision is taken i.e. the decision making process itself."

Referring to the case of Krishna Kakkanath (supra) the learned counsel submitted that "although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other such authority to do business with him alone and the Government or its authorities have got a right to enter into contract with a particular person or persons with whom the Government wants to deal". It was further argued with reference to what has been laid down in para 34 of the judgment that "unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down", and it was further, argued that it must be borne in mind that except for the limited purposes of testing a public policy in the context of illegality and constitutionality, the Court should avoid embarking on "uncharted ocean of public policy".

The learned Advocate General in a positive tone supplemented the argument of Mr. Mohapatra, learned counsel for opp. party No. 6, and stated that according to the previous policy in between the years 1982 to 94 the OFDC and the TDCC were alone collecting the Sal seeds, but the Government wanted to change the policy for better procurement of Sal seeds and for augmenting Government revenue,

Referring to para 41 of the case of M.P. Oil Extraction v. State of Madhya Pradesh reported in AIR 1998 SC 145 the learned Advocate-General submitted that "the executive authority of the State must be held to be within its competence to frame policy for the administrative of the State. If the policy framed is absolutely capricious and, not being informed by any reasons whatsoever, it can be held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution. Unless such policy offends other provisions of the Constitution or comes in conflict with any statutory provision, the Court cannot and should not out step its limit and tinker with the policy decision of the executive functionary of the State". Quoting the observation of the Supreme Court it was further submitted that "the democratic set up to which

the policy is so deeply committed cannot function properly unless each of the organs of the State i.e. Legislature, Executive and Judiciary appreciate the need for mutual respect and supremacy in their respective field.

The respective contentions of learned counsel for the parties need examination.

9. With regard to the contention of Mr. Rath, learned Senior Counsel for the petitioner, on the point of non-compliance of the provisions of Sub-rule (7) of Rule 3 of the Rules we are of the view that, no doubt, the provisions of the Rules provide that the State is competent to appoint any co-operative society as an agent even without complying the conditions under Rule 3 and the appointment of any co-operative society dispensing with the observance of other conditions under the Rules can be done only when the Government have recorded reasons that it felt expedient in the interest of public that the co-operative society should be so appointed. No doubt, Annexure 8 the impugned order does not indicate recording of such reasons, but in our view, Annexure 8 is the "communication of the order and is not supposed to bring out details of the minute's of the Government proceedings which can alone be found from the records. On going through the connected Government records produced by the learned Advocate-General, we find that reasons have been recorded that MARKFED being a sick unit in the co-operative sector needed revival.

Further, we accept the contention of Mr. Mohapatra, learned counsel for the opposite party No. 6, that the action should not be struck down if, in fact, while taking action the Government were conscious of the reason and the same weighed in their mind that the MARKFED was a sick unit and this reasoning, according to Mr. Mohapatra is apparent on the face of the agreement between opposite parties 5 and 6.

Therefore, we are unable to accept the contention of Mr. Rath that no reason was recorded for dispensing with the compliance of the provisions of Rule or the Rules and therefore there was nothing wrong in appointing the MARKFED as Agent.

10. Next we examine the point raised by Mr. Rath that whether appointment of M/s. Hanuman Vitamin Foods Limited, opposite party No. 6 as the RMP was mala fide.

We do not find anything mala fide in the appointment of opposite party No. 6 and for that we are unable to accept the contention of Mr. Rath.

Appointment of opposite party No. 6 was done in its capacity as a lessee or it would be more appropriate to say that it was an agent of MARKFED. It is not disputed that the MARKFED so far as its solvent plant at Bargarh is concerned is a losing concern and according to the Government it has become sick. The agreement between the MARKFED and opposite party No. 6 is apparent on this aspect that the MARKFED is unable to run the business on its own, the reasons of which we are not to probe here, Fact remains, opposite party No. 6 has been

given the charge of management of the plant as a lessee for a period of five years for which it has been agreed between the parties that in return opposite party No. 6 would pay certain monthly amount to the MARKFED.

Therefore, there being a privity of contract between the MARKFED and opposite party No. 6 which in the absence of "material cannot be said to be an unholy agreement, we accept the position that opposite party No. 6 has been an agent of the MARKFED for the purpose of running its plant. The agreement shows that it has become effective from 2nd May. 1997 though the agreement was signed on 21-11-1996. Opposite party No. 6 was also engaged in the year 1997 for the first time as the RMP. Then it was not so engaged on its own in the capacity of an owner/proprietor of a solvent extraction plant, but because of its being a lessee of the MARKFED. That apart, such an appointment of opposite party No. 6 cannot be questioned by the petitioner after it worked in the field for two years. Therefore, the contention of Mr. Rath is unacceptable to us since the MARKFED for the above reasons continued to be the owner of the plant and opposite party No. 6 remained in its management as an agent.

It was strenuously argued by Mr. Rath, learned counsel for the petitioner that the contention of the State that opposite party No. 6 was engaged as RMP with a view to revive the sick unit of the MARKFED at Bargarh is without any basis. It was submitted that nowhere in the agreement between the MARKFED and opposite party No. 6 the word "sick" has been whispered nor has opposite party No. 6 undertaken to revive any sick unit by the terms of the said agreement and that the concept is totally absent in all connected Government documents. Quoting the Government policy of 1995 In regard to the question of appointment of RMP Mr. Rath submitted that the policy did not lay down that any sick unit should be revived by virtue of the policy i.e. appointment of RMP.

True, the word "sick" is not found in the Government policy of 1995., but fact remains that the unit at Bargarh is in a losing concern. Therefore, we have not felt it necessary to dilate with the implication of the absence of the word "sick."

11. At this, it becomes necessary to examine whether the action of the Government in appointing opposite party No. 6 as the RMP created a monopoly in its favour and the action is unconstitutional being violative of Articles 14 and 19(6) of the Constitution. It is stated that by such appointment reasons are not known for giving exclusive right of collection of Sal seeds to opposite party No. 6 which constitutes creation of monopoly in favour of a private party by an administrative order. To fortify this argument of Mr. Rath reliance is placed on the decision of the Constitution Bench in the case of *Mannalal Jain Vs. The State of Assam and Others*, Referring to the agreement between the MARKFED and opposite party No. 6 Mr. Rath submitted that It is clear that Hanuman Vitamin Foods Ltd. has agreed to pay to the MARKFED a monthly amount of rupees one lakh. The agreement admittedly does not speak of any trade in Sal seeds.

With great respect we are unable to accept this submission. It is also the case of

the petitioner that the RMP policy is beneficial to the Government. In the present case, the MARKFED has been appointed as the Agent and opposite party No. 6 as the RMP working under MARKFED. It is apparent that what-ever Sal seeds collected has to be proceeded in the plant of the MARKFED, but the collection has to be carried on by opposite party No. 6 and this is being done in its capacity as agent to the MARKFED. We have no information nor material have been placed before us to judge, in the absence of any specific figure, as to how much raw materials M/s. Hanuman Vitamin Foods Ltd. as the agent of the MARKFED to run the unit would need or what quantity of raw materials would be necessary for running the unit for its revival/survival and whether there would be any surplus after such utilisation and that the surplus would be of such quantity so as to draw a conclusion that opposite party No. 6 being the sole beneficiary has utilised the raw materials on his own in order to earn huge profit by way of monopoly trade. It would be difficult for us to authoritatively hold, in the absence of any such material, that appointment of Hanuman Vitamin Foods Ltd. has created a monopoly, in the trade though we are of the view that in the present set up and under the present policy the scope for individual monopoly in the trade cannot be ruled out which the State should take care to guard keeping in view the provisions of Article 16(6) of the Constitution. This is for the Government to see that even though It has appointed M/s. Hanuman Vitamin Foods Ltd. as the RMP, the matter of monopoly trade, If any, at its level is checked. Reliance is placed on the case of Akadasi Padhan Vs. State of Orissa, .

12. The next question is to examine the submission of Mr. Rath whether non-consideration of the petitioner's case has violated Article 14 of the Constitution.

It is stated that the petitioner was there in the field also earlier. It has its own oil extracting plant. It needs raw materials for its plant. While considering the case of appointing RMP there was no reason for denying the opportunity to the petitioner when it had made an application which needed consideration. This action of the Government therefore has" violated the equality clause of Article 14 of the Constitution. Reliance is placed by Mr. Rath on the case of Rashbihari Panda etc. Vs. State of Orissa, .

We have heard the learned Advocate-General and also we have gone through the connected records produced from the side of the Government. Admittedly, the petitioner had made an application and the Government record shows its matter was there before the Government at one stage but its case has not been considered. No reason is given as to why it was not given the appointment as a RMP. Since the petitioner owns an oil plant, under the policy of the Government, it had the right to be considered for such appointment. We may observe that so long the RMP policy is in force, the policy would be applicable to all owners of oil extracting units in the State unless for some reason or other any of them becomes ineligible because of some justifiable reasons. We do not find that there was any justification to eliminate the case of the petitioner from consideration and even if Government had the right to eliminate, they should have come

forward with a reason which is found absent. We, therefore, hold that there has been violation of the provisions of Article 14 of the Constitution and Government action therefore is arbitrary and we, hold accordingly.

13. In the result, the writ petition is allowed. However, since the period of collection of Sal seeds has come to an end by 30-6-1999 by virtue of Government decision, so we do not propose to issue any writ and leave the matter to Government for their consideration of the petitioner's case for the coming year, if the Government chose to continue the policy. No costs.

P.K. Mishra, J.

14. I agree.