

(1991) 01 OHC CK 0015

In the Orissa High Court

Case No : Original Jurisdiction Case No. 961 of 1995

Purna Chandra Panda

APPELLANT

Vs

Government of Orissa and Others

RESPONDENT

Date of Decision : 29-01-1991

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1996 Ori 173 : (1996) 82 CLT 1

Hon'ble Judges : D.P. Mohapatra, Acting C.J.; P.C. Naik, J

Bench : Division Bench

Advocate : D.P. Sahoo and N. Chakravarty, for the Appellant; Addl. Standing Counsel and Devashis Panda and P.M. Pradhan, for the Respondent

Final Decision : Allowed

Judgement

P.C. Naik, J.—In this petition under Articles 226 and 227 of the Constitution of India, the petitioner prays for issuance of an appropriate writ, direction or order quashing the order allotting a 24 hours medical store in the campus of the Upgraded Primary Health Centre, Khariar in favour of Opposite Party No. 2.

2. It is the case of the petitioner that an advertisement was published in the issue of daily "Samaj" dated 5-7-1994 inviting applications from unemployed Pharmacists (Gents and Ladies) and persons having medical shops for opening day and night medical shops in the campus of headquarters hospital and Community Health Centres (for short, "C.H. Cs") in the district of Nuapada. The applications were to be addressed to the Chief District Medical Officer, Nuapada. According to the petitioner, he runs a medical shop* but he did not submit any application for the day and night Drug Store as the advertisement related to allotment of shops in the district headquarters and C. H. Cs whereas at Khariar there was only an Upgraded Primary Health Centre (hereinafter referred to as "UGPHC"). It is alleged that he was under a bona fide impression that the application was not meant for UGPHC, Khariar. However, to his utter surprise, he came across a communication of the Health Department permitting opposite

party No. 3 to open a medicine shop in the campus of UGPHC, Khariar. It is alleged that opposite party No. 3 is the wife of opposite party No. 4, who is a Government employee serving as a pharmacist in the UGPHC, Khariar and that the allotment of a day and night shop in favour of opposite party No. 3 is mala fide and due to collusion between opposite parties 3 and 4. It is further submitted that opposite party No. 2 is not an unemployed Pharmacist and as such, she did not fulfil the criteria laid down in the advertisement and ought not to have been considered. He accordingly, prays for quashing the order passed in favour of opposite party No. 3 as per Annexure-1.

3. The petitioner has also challenged the opening of a second shop on the ground that his shop is sufficient to cater to the needs of the area and there is no necessity for a second shop. However, this cannot be considered as in our considered opinion, a monopoly cannot be created in favour of the petitioner and the authorities are therefore free to open a day and night medicine shop within the campus as per their policy to cater to the needs of the people. Opening of a second shop will also entail supply of medicines at reasonable rates as it will do away with the possibility of exploitation of the people which may be possible if there is no competition and only one shop exists in the area.

4. In response to the notice, a counter affidavit was filed on behalf of opposite party No. 3 opposing the petition. Opposite party No. 3 does not dispute the issuance of an advertisement on 5-7-1994 but submits that it also applied to UGPHC for opening of day and night shops in UGPHC as in terms of a letter of the Director, Health Services, Orissa dated 26-2-1994, a C. H. C. includes as UGPHC for the purpose of establishing a Drug Store. It is further averred that the District Advisory Committee had on 30-4-1994 taken a decision for opening five day and night medicine stores in the district headquarters Hospital, Nuapada, one each at C. H. C. Kumna/Kh. Road/Sinapalli and UGPHC, Khariar and, as per Government ecision, Khariar was reserved for ladies. It is further averred that accordingly, on receiving application of Smt. Bharatee Panigrahi of Khariar Road, she was selected for opening a 24 hours medical store in the campus of UGPHC, Khariar.

5. A common counter affidavit has been filed on behalf of opposite party No. 2 who has been parmitted to run the store, and her husband opposite party No. 4 who is a Government employee and posted as a Pharmacist in the UGPHC, Khariar. The stand of opposite party Nos. 2 and 4 is that as the UGPHC, Khariar has been reserved for ladies by opposite party No. 3, the allotment of shop in her favour is proper. It is averred that in view of the reservation, the petitioner was not eligible and even if he had applied, he could not have been considered and as such, he cannot challenge the allotment of the shop in her favour. Opposite party Nos. 2 and 4 have in their counter substantially adopted the averments made in the counter of opposite party No. 3 (C.D.M.O.) that as the C. H. C. includes an UGPHC for the purpose of establishing Drug Store, the authorities were justified in considering her application for opening a shop in the UGPHC, Khariar. The

counter also makes a reference to the guidelines issued by the Health Department wherein it is laid down that a person who can engage a Pharmacist irrespective of whether he himself is a Pharmacist or not, can also be considered.

6. Having heard the learned counsel for the parties in the light of the averments made in the petition, counter affidavits and after perusing the documents and records, we are of the opinion that the grant in favour of opposite party No. 2 cannot be sustained. Admittedly, opposite party No. 2 is not a Pharmacist for the averment in paragraph 16 of the petition that opposite party No. 2 is not a Pharmacist has not been controverted by her who merely states that in terms of the guidelines, permission can be granted even to one who is not a Pharmacist if that person can engage a pharmacist for managing the shop. The advertisement dated 5-7-1994 clearly provides that "Unemployed Pharmacists (Gants and Ladies) and persons having medical shops" could apply if they were interested in opening day and night medical shops "in the campus of Headquarters Hospital and C.H.Cs. of Nuapada District." Thus, in terms of the advertisement, only persons who were unemployed Pharmacists could apply. The advertisement does not provide that persons who are not Pharmacists but are prepared to engage a Pharmacist can apply. Further, the advertisement clearly relates to opening of day and night medical shops in the campus of headquarters hospital and C.H.Cs. in Nuapada District. Admittedly, Khariar neither has a district headquarters hospital nor has a C.H.C. The advertisement does not state that an UGPHC would be treated as a C.H.C. for the purpose of this advertisement. The advertisement also does not indicate that thirty per cent of the shops are reserved for ladies or that the UGPHC, Khariar was reserved for ladies.

7. The fact that for the purpose of opening a Drug Store, the Primary Health Centre would be considered as C.H.C.; that thirty per cent of the shops are to be reserved for ladies; and that the shops in the campus of UGPHC, Khariar is reserved for ladies, may be contained in Government letters and files of the Health Department or the C.D.M.O., but was definitely not mentioned in the advertisement. What is contained in the files. and communication from one office to the other may be within the knowledge of the concerned officers but cannot be presumed to be known to the people at large. It is quite natural that a normal person will be guided by the plain language of the advertisement and would act accordingly. The petitioner is, therefore, justified in his submission that he was under the bona fide and reasonable impression that as the advertisement was meant for only headquarters hospitals and C.H.Cs. and he did not apply because Khariar had neither a district headquarters hospital nor a C.H.C., but only had an UGPHC. There is also no material on record to indicate that it was ever notified that for the purpose of opening of a Drug Store, a C.H.C. would also include an UGPHC. We are, therefore, inclined to accept the submission of the petitioner that s the advertisement did not mention anything about opening of a shop as an UGPHC, he did not apply for opening a Drug Store in the campus of UGPHC.

8. There is nothing in the advertisement to indicate that a particular percentage

of shops were reserved for ladies and that UGPHC, Khariar was accordingly reserved for ladies. In these circumstances, the contention of the petitioner that the action of opposite party No. 3 in recommending the case of opposite party No. 2 seems mala fide, does not appear to be wholly unjustified.

9. To show their bona fide, what was least expected of opposite party No. 3 was to have disclosed before the Court the number of applications received and the manner in which opposite party No. 2 came to be selected. But these facts have not, if we may say so, for reasons best known to opposite party No. 3, been disclosed to the Court. All that has been stated by opposite party No. 3 in paragraph 5 of his counter-affidavit is that "as per Government decision, Khariar has been reserved for ladies. Accordingly, after receipt of the application of Smt. Bharatee Pani-grahi, she has been selected to open 24 hours medical store in the campus of UGPHC, Khariar vide letter No. 55002/R dated 6-12-1994." If one reads between the lines, one gets an impression that probably opposite party No. 2 was the sole applicant.

10. In our opinion, the facts that applications could also be received for opening a day and night medical shop in the UGPHC, Khariar; that thirty per cent of the shops were reserved for ladies; and that Khariar UGPHC was exclusively reserved for ladies; that for the purpose of opening Drug Store a C.H.C. would include an UGPHC, and that a non-pharmacist could also, if he was prepared to engage a Pharmacist, were probably known to opposite party No. 2 and the authorities, as the advertisement dated 5-7-1994 is silent on the said facts.

11. On an overall consideration of the material on record, we are constrained to observe that the grant of permission to. opposite party No. 2 appears to be suspicious. Obviously, the authorities concerned have not acted in a fair and proper manner. In our opinion, therefore, the grant in favour of opposite party No. 2 cannot be sustained.

13. For the reasons aforesaid, the petition is allowed, the grant made in favour of opposite party No. 2 as reflected in Annexure I is set aside and Annexure 1 to the petition is quashed. It follows that the authorities concerned will issue a fresh advertisement containing all relevant details subject to which permission is to be granted and shall thereafter make a selection in a fair and proper manner. We may, however, observe that the authorities should bear in mind that a registered Pharmacist would get priority over both a person having previous experience of run-ning a medical store and a person not being a registered pharmacist who undertakes to engage a Pharmacist in the medical store. Further, we observe that if opposite party No. 2 has already opened the shop then it will be open to opposite party No. 3 to permit her to continue the arrangement till fresh selection is made so that inconvenience to the public is avoided. Fresh selection should be made within six weeks from the date of receipt of the writ which should be issued forthwith.

D.P. Mohapatra, Actg. C.J.

14. I agree.