
(1996) 05 OHC CK 0016

In the Orissa High Court

Case No : Original Jurisdiction Case No. 431 of 1996

Rabindranath Mahapatra

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 15-05-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1996 Ori 220

Hon'ble Judges : P.C. Naik, J;A. Pasayat, J

Bench : Division Bench

Advocate : S.C. Parija and P.K. Behera, for the Appellant; S.K. Nayak-2, K.K. Rout and B.K. Sahoo, A.K. Baral and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Pasayat, J.—Petitioner calls in question decision taken by the Health and Family Welfare Department of the State Government to grant licence for opening of a twenty-four hours day and night medical store inside Agarpada Community Health Centre in favour of opposite party No. 5. Said opposite party was selected on the basis of a recommendation made by the concerned Advisory Committee on 22-8-1994. Basic grievance of petitioner is that opposite party No. 6 is the husband of opposite party No. 5 and he played a vital role in changing the norms of selection and participated in the process of selection of his wife.

2. Background facts as projected by the petitioner are essentially as follows:

Government in Health and Family Welfare Department have prescribed guidelines of selection for opening medical stores in the campus of Medical College Hospitals/District Headquarters Hospitals and Hospitals equivalent to them and Sub-Divisional Hospitals of the State. In its circular dated 10-7-1991, Government in Health and Family Welfare Department intimated the Director of Health Services, Orissa, the Director of Medical Education and Training, Orissa, all the Chief District Medical Officers, all the Superintendents of Medical Colleges,

Chief Medical Officer, Capital Hospital, and the Drugs Controller, Orissa, about the decision of the State Government fixing the criteria and rules and procedure for opening of medical stores at different places as indicated above. In the said circular it has been specified that in respect of twenty-four hours day and night medical stores, the criteria for selection shall be as specified in the circular. After selection the selected persons are required to furnish an undertaking to strictly comply with the provision of Drugs and Cosmetics Act, 1940 (in short, "the Act"). Subsequently, by letter dated 13-5-1993, the procedure was revised. It was specified that twenty-four hours medical stores shall be opened only in the campus of Medical College/District Headquarters Hospitals/Hospitals equivalent to District Headquarters and Sub-Divisional Hospitals. It was made clear that the other hospitals and medical institutions will not have this facility. In the said letter it was set out that the Superintendent, Chief District Medical Officer, and the Chief Medical Officer concerned shall at the outset assess the need for having a twenty-four hours medical store in the campus of his hospital, If the need is found to be imperative, the concerned official shall make an order to that effect in the connected file and issue advertisement at least in two local dailies inviting applications from eligible persons. The criteria for selection was indicated at para. 5 of the latter. Subsequently, by letter dated 9-11-1993 revised procedure for opening of medical stores was prescribed, providing that 30 per cent of the twenty-four hours medical stores within a district was reserved for ladies and such stores were to be identified by the Chief District Medical Officer and advertisement was to be issued accordingly. By letter dated 26-5-1993 the Government Order dated 13-5-1993 was modified to the extent that (a) a person having the requisite qualification may apply for running a medical store in Government Hospital; (b) a person to be considered eligible for the purpose shall be a registered Pharmacist either with a degree or diploma in Pharmacy. But a person who can engage a Pharmacist irrespective of whether he himself is a Pharmacist or not may be considered; and (c) an unemployed person having previous experience of running a medical store shall be given preference. Subsequently by office order dated 4-2-1994, Government in Health and Family Welfare Department decided to run one day and night (24 hours) medical store in each of the Community Health Centres of the State. Accordingly instructions were issued. The conditions laid down in Government Orders dated 13-5-1993 and 26-5-1993 and the order dated 9-11-1993 were made operative to medical stores to be opened in the Community Health Centres. Again vide Office Order dated 26-2-1994 instructions were issued in partial modification of the Government Order dated 4-2-1994, and it was laid down that since the Community Health Centres do not have required funds to meet the expenditure for publication of advertisement in local dailies, it may not be possible for them to publish the advertisement in time through the Information and Public Relation Department. Moreover, the area of operation of the Community Health Centres being small, it is not necessary to issue advertisement in the newspapers. So far as the Community Health Centres are concerned, it was laid down that applications may be invited by publishing notice in the notice board of the

Community Health Centres. However, other terms and procedures as well as the criteria for selection as indicated in the earlier Office Orders were not modified.

3. Petitioner is running a medical store adjacent to the campus of Agarpada Community Health Centre, and the said medical store is being run by him since last many years with a valid licence under the Act. In fact several other medical stores adjacent to the Community Health Centre at Agarpada cater to the needs of patients attending the said Centre. Petitioner came to know from the notice board of the Community Health Centre that applications had been called for from persons intending to run twenty-four hours day and night medical store to be allotted inside the campus of the Centre. On coming to know of the above notice, petitioner filed an application on 10-7-1994 giving the details of his experience of running medical store and also furnished the other details on the basis of which he staked his claim for being selected to run the store. After receipt Of his application, the Medical Officer in charge of the Agarpada Community Health Centre asked the petitioner to remain present at the said Centre at 11.30 a.m. on 8-8-1994 for consideration of his application for selection and recommendation for opening a day and night medical store by the Advisory Committee of the centre. The petitioner duly appeared on the date and time fixed, but the meeting could not be held due to lack of quorum. Petitioner was informed that the meeting would be held on a subsequent date, and he would be informed about the date and time of the meeting. He was never informed about any subsequent meeting. Since no notice was received by him, he approached opposite party No. 4 and to his utter surprise came to know that the Advisory Committee had already taken a decision on 22-8-1994 to recommend the name of opposite party No. 5 for opening 24 hours medical store in the campus of Community Health Centre at Agarpada. No notice of such meeting was issued to the petitioner or to any other applicant. Petitioner wanted a copy of the purported decision taken by the Advisory Committee and made a formal application in that regard. But the same was refused and the petitioner was intimated by letter dated 14-11-1995 that he cannot be supplied with the copy of proceeding unless he gets permission from the Chief District Medical Officer, Bhadrak. Petitioner approached the C.D.M.O. (opp. party No. 3) to grant him permission, which was refused on the ground that he is not entitled to copy of the decision. However, petitioner managed to get a copy of the resolution of the Advisory Committee of Agarpada Community Health Centre dated 22-8-1994. On perusal of the copy of said resolution, he came to know that the Advisory Committee had taken a decision on 22-8-1994 recommending the name of opp. party No. 5 for opening a day and night medical store without any notice to the petitioner and other applicants. To his utter shock and dismay, he noticed that the Advisory Committee consisted of the husband of opposite party No. 5, who is opposite party No. 6. In the Advisory Committee meeting opposite party No. 6, who acted as Chairman being the Member of Legislative Assembly (M.L.A.) of the area, managed to push through his wife's case and influenced the authority concerned to issue necessary order in favour of opposite party No. 5. It was

noticed by the petitioner that the criteria for selection had been so fixed, that others were to be eliminated, and only opposite party No. 5 would hold the field. Petitioner came to know that the recommendation of the Advisory Committee had been accepted by the State Government. He has moved this Court for interference on the ground of mala fides and apparent illegalities.

4. It is the petitioner's case that the criteria fixed by Government Orders dated 13-5-1993 and 26-5-1993 were not followed and more particularly opposite party No. 6 unilaterally fixed the criteria for selection of candidates in the meeting of the Advisory Committee held on 22-8-1994. The Resolution dated 22-8-1994 clearly shows that the criteria fixed by the Chairman-cum-MLA (O.P. 6) was with a view to suit opposite party No. 5 and the criteria so fixed was in gross disregard of the general criteria laid down by the State Government.

5. The selected candidate opposite party No. 5 has filed her counter-affidavit inter alia taking the stand that there was no illegality committed in selecting her. Though presence of her husband at the meeting is not denied, it has been submitted that the other members present in the meeting agreed to the criteria fixed by the Chairman, and therefore, the decision of the Government for selecting her cannot be faulted. It is further stated that in the matter of selection the Advisory Committee had no role to play and it was open to the State Government to turn down the suggestion given by the Advisory Committee.

Neither the State Government nor opposite party No. 6 has filed any counter.

6. It is to be noted here that by Resolution dated 29-7-1992 of the Government in the Health and Family Welfare Department, the Hospital Advisory Committees in the Community Health Centres including upgraded primary health centres were reconstituted and the local M.L.A. was to be the Chairman. The Medical Officer in charge of the Community Health Centre/Upgraded Primary Health Centre was the member-convenor and there have to be eight members. The Advisory Committee of Agarpada Community Health Centre consisted only five members including the M.L.A. (opp. party No. 6) as the Chairman and it took the impugned decision. The concerned C. D. M. O. who is a member was not present and another doctor who was in charge of the C. D. M. O. was requested to attend the meeting.

7. The vital question is whether participation of opposite party No. 6 in the matter of sponsoring the name of opposite party No. 5 rendered the decision making process vulnerable. The scope of interference in administrative decisions by judicial review is extremely limited. The actions of the State, the instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such action would be tested on the anvil of Article 14 of the Constitution. Article 14 is more in the nature of an administration to the state and does not directly purport to confer any right on any person as some of the other Articles, example Article 19 do. Article 14 is an injunction to both the

legislature and the executive. Administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every clause of statutory function of executive, quasi legislative and quasi-judicial nature. The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To satisfy the requirement of non-arbitrariness in a state action, it is necessary to consider and give due weight to the reasonable sole or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic; but provides for control of its exercise by judicial review. The mere reasonable or legitimate expectation of a citizen, in such a situation may not itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. See *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, It is fundamental of rule of law and the principles of natural justice that the decision making process must be by an impartial person, that is, a person who is not a party to the case or is not to have interest in the subject-matter of adjudication.

8. It is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias, but that the circumstances are such as to create reasonable apprehension in the mind of others that there is a likelihood of bias effecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done. It is also important to note that this rule is not confined to cases where judicial power *stricto sensu* is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties. Justice is not the function of the Court alone, it is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to authorities exercising judicial power are being increasingly applied to administrative bodies, for it is vital to the maintenance of the rule of law in a welfare State where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the State should discharge their functions in a fair and just manner. In *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, , it was observed that there can be no doubt that if a

selection committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him, but he must withdraw altogether from the entire selection process.

9. The facts of the present case are telltale. We find no substance in the plea of learned counsel for opposite party No. 5 that mala fide has been attributed as the last resort of a losing litigant. The plea of mala fides has been made in a pointed manner. The heavy burden in establishing mala fides is certainly to be reached by Courts in that connection. Charge of mala fides is more easily made than made out. It is to be ensured that the plea of mala fides is not made the last resort of a losing litigant. While evaluating a plea of mala fides, quite often the Government files give helpful clues about objective facts. A party, total stranger to the notings in the file and the processing of the papers would not be in a position effectively to mention with precision the events which twisted a given trend of opinion. The files, therefore, would throw much light when the Court is confronted with allegations of one party and denial of other. While moving along the track of Government's decision making process, the files provide ample material to judge acceptability of the plea of mala fides. It may be difficult to obtain information and evidence of direct dialogues or such other activities carried on with foul motives. Inferences could, however, be drawn from proved circumstances.

10. The admitted position is that in the process of recommendation, opp. party No. 6 had a vital role to play, being the Chairman of the Advisory Committee. He also fixed the norms for selection in variation of the criteria fixed by the Government. A faint plea was taken by opposite party No. 5 to the effect that the final decision is that of the Government, and even if there is any infirmity in the process of recommendation, same is not binding on the Government which is to take its own decision. The file produced by the Government contains the order passed by the Minister, Health, Orissa. It provides the knock out punch to the plea of opposite party No. 5. It reads as follows: "As per the recommendation of MLA Shri Prafulla Kumar Jena, S. L. No. 1 Smt. Manorama Dalai is approved."

The noting appears at page 3 of the file and pursuant to that, order in favour of opposite party No. 5 has been passed. It was not the recommendation of the Advisory Committee, but the recommendation of the MLA which weighed with the Minister for directing Selection of opposite party No. 5. This is a clear case of vulnerable administrative action, and in view of the factual scenario indicated above, the inevitable conclusion is that selection of opposite party No. 5 is indefensible. Accordingly the impugned order of the Government dated 8-11-1994 vide Annexure-9 is quashed. Let a fresh decision be taken in the matter in accordance with law.

The writ application is allowed. No costs.

P.C. Naik, J.

11. I agree.