
(2008) 01 RAJ CK 0108
In the Rajasthan High Court

Rakesh Bhandari (Dr.)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-01-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 3 RLW 1963

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vineet Kothari, J.—Heard the learned Counsel for the parties at length.

2. This writ petition has been filed by the petitioner challenging allotment of retail outlet of petroleum products by the respondent No. 2 - Bharat Petroleum Corporation Ltd. (BPCL for short) in pursuance of advertisement Annex. 1 dated 10.2.2005 for place Kelwa NH-8 in Dist. Rajsamand at serial No. 79 in the list. The petitioner has prayed that award of said dealership in favour of private respondent No. 3 Mr. Pawar Kumar Paliwal was on account of indiscriminate award of higher marks in the selection process to the said respondent and therefore, the petitioner was deliberately kept marginally lower at second place and while total marks awarded to the private respondent No. 3 Mr. Pawan Kumar Paliwal was 86.9, the marks awarded to the petitioner was 85.1 in the selection interview held on 11.6.2005 for said outlet at Kelwa and therefore, allotment in favour of the private respondent No. 3 deserves to be quashed and set aside.

3. The respondents have filed their reply to the said writ petition and as directed by this Court also kept ready the original record of the interviews held for two outlets; one for Kelwa on 11.6.2005 and another for Neemuch Road, Dist. Chittorgarh held on 3.6.2005. Respondent No. 3 applied for both outlets, whereas petitioner applied only for Kelwa outlet.

4. Mr. P.S. Bhati, learned Counsel for the petitioner taking the Court through

comparative allocation of marks for these two others on 3.6.2005 and 11.6.2005 vide Annex. 4 and 5, pointed out that on the same set of documents furnished by the respondents No. 3 Mr. Pawan Kumar Paliwal for both these outlets, he was arbitrarily given different marks by two Selection Committees and thus the petitioner was deliberately pushed down marginally by little over one percentage and had the respondents been fair and abided by the guidelines given for allocation of marks in this regard, which are produced on record as Annex. 3, the petitioner would have ranked at serial No. 1 and could be awarded said outlet at Kelwa- NH 8. He particularly drew the attention of the Court in the award of marks to respondent No. 3 - Mr. Pawan Kumar in the following column of Annex. 4 and 5:

Name	Awarded marks	for Kelwa for outlet	Neemuch Road Outlet	S.No.	Category
availability Pawan Kumar	18	12	of finance Max. 20	(vi)	Ready
(vii) Educational Pawan Kumar	10	-	qualification Max. 15		Bhandari
Capability to generate business.	(ix)	Tied up volume Pawan Kumar	5	5	Max. 5
Dr. Rakesh	5	-	Bhandari		
(x) Project report Pawan Kumar	3	2	Max. 3		Dr. Rakesh 1.7 Bhandari
Overall assessment Pawan Kumar	2	1.7	Max. 2		Dr. Rakesh 0.5 - Bhandari
Business ability/ Pawan Kumar	5	2.5	acumen Max. 5		Dr. Rakesh 1.7 - Bhandari

5. Initially one of the members of the Selection Committee in both the interviews on 3.6.2005 and 11.6.2005 Mr. P. Lohani was impleaded as respondent in the writ petition. However, later on, on account of not pressing the allegations of malafides against him this Court deleted the said respondent P. Lohani from the array of respondents vide order dtd. 20.2.2006.

6. Mr. Sunil Beniwal, learned Counsel appearing for the respondent No. 2 - BPCL as well as private respondent No. 3 Mr. Pawan Kumar Paliwal urged that reason for difference in marks of respondent No. 3 Mr. Pawan Kumar Paliwal on 11.6.2005 in comparison to the previous interview held on 3.6.2005 were as under:

(i) 18 marks given on 11.6.2005 for Kelwa outlet as against 12 marks for Neemuch road outlet was on account of the fact that as per the guidelines Annex. 3 (relevant page No. 40 and 41), the ready availability of finance carrying maximum marks of 20 was divided in three headings:

(a) liquid cash availability 12 (b) Fixed and movable assets 4 (c) Income 4

While availability of liquid cash in the form of F.D. etc. carried 12 marks, other two categories regarding fixed and movable assets and income carried 4 marks each. These marks coupled with assessment based on leading questions and also

verifying documents submitted and given in column 4 of the said guidelines at page 40 and 41 of the paper book, he submitted that since on the previous date original papers regarding immovable property in the form of land etc. were not made available to the Selection Committee on 3.6.2005, the said respondent No. 3 was given only 12 marks for liquid cash availability in the form of fixed deposits, whereas on the next date for Kelwa outlet, the said person Mr. Pawan Kumar Paliwal produced those original papers regarding immovable property also and therefore, 6 marks under two remaining headings of fixed and movable assets and income were given to the said person; thus making 18 marks. For other difference in the categories as indicated above particularly with reference to business ability/acumen, he submitted that on the previous date 3.6.2005, the said respondent Mr. Pawan Kumar Paliwal was given 2.5 marks, whereas on 11.6.2005 he was given 5 marks which would depend upon the questions asked and answers given during the course of interview and that being subjective satisfaction of the members of the Selection Committee, this Court could not go into that question. He thus, tried to justify the difference in the marks with regard to respondent No. 3 on these two dates.

7. Mr. Bhati, learned Counsel for the petitioner submitted in counter to these arguments that the conditions of advertisement for these outlets vide condition No. 8(c) (page 39 of the paper book) clearly stated that once the application was filed, the applicant was not allowed to add, reduce or modify the said application or data or documents submitted therewith. Therefore, there was no question of said respondent Mr. Pawan Kumar Paliwal having been allowed to submit original documents of immovable property for the first time during the course of interview for Kelwa outlet. He submitted that though condition No. 8(c) allowed the original documents to be produced at the time of interview, but he submitted that this was only for verification purpose and this could not result in change of marks. Elaborating further his argument, Mr. Bhati submitted that if 12 marks under column No. (vi) could be given to Mr. Paliwal on 3.6.2005 for Neemuch Road outlet on the basis of photo-copies of same documents including ready availability of liquid cash part, there was no question of increasing those marks merely because the original papers relating to immovable property were produced later on 11.6.2005. He submitted that neither this explanation has been given by the respondent-Company in its reply- affidavit nor it is plausible and acceptable. He further submitted that marks under column (x) relating to project report which was common in both the dates from the said of respondent No. 3, how could marks given on 3.6.2005 for project report at 2 could increase to 3 on 11.6.2005. Likewise he assailed increase of marks of respondent No. 3 in business ability and acumen in column No. (xiv) from 2.5 to 5 on 11.6.2006. These marks compared with the marks, of the petitioner, were awarded deliberately to push down the marks of the petitioner who unfortunately remained in ultimate analysis only marginally less than the respondent No. 3. He submitted that the petitioner being qualified CA not only carried much higher business acumen and even his ability to generate business and availability of

finance was more than adequate and that is why in column No. (vi) he was given 20 marks as against 18 marks to Mr. Pawan Kumar Paliwal for Kelwa outlet. For educational qualification, the petitioner was given 15 marks as against 10 to respondent No. 3.

8. The learned Counsel for the petitioner also submitted that difference of marks in business ability/acumen was also deliberate and arbitrary. In substance he submitted that decision making process has not been fair on the part of the Selection Committee and it is a clear case of arbitrary favouritism in favour of respondent No. 3 to cause prejudice and take away the right of allotment of the petitioner.

9. I have heard the learned Counsel for the parties at length and perused the pleadings and record of the case including the original record which was produced by the learned Counsel for the respondents during the course of arguments.

10. Though it is well settled that scope of interference in the award of Government contracts in Article 226 of the Constitution of India enabling this Court to have judicial review of such matters is very very limited and this Court cannot sit as an appellate Court or. Reviewing Authority or the Selection committee itself and the scope of judicial review under Article 226 of the Constitution of India is limited to the extent of seeing fairness or non-arbitrariness in decision making process of the State authorities or the authorities of a Government Company, like BPCL, but if the facts stare in the face and point out to the glaring discrimination or exercise of discretion by such authorities in arbitrary and whimsical manner, even within the aforesaid limited scope under Article 226 of the Constitution of India, this Court can interfere in such cases and look into the record at the instance of the petitioner and find out whether the decision making process has been fair and reasonable or not.

11. In the present case it appears as is apparent from the marginal difference of marks between the two parties, namely, the petitioner and private respondent No. 3, that difference in marks in different areas of awarding such marks in accordance with the guidelines contained in Annex. 3 has been caused for extraneous or inexplicable reasons. The explanation given by the learned Counsel for the respondents that since the original documents for immovable property was produced by the respondent No. 3 on 11.6.2005 for Kelwa outlet and therefore, he was awarded 18 marks as against 12 marks on the previous date 3.6.2005 does not impress this Court. It is clear stipulation in advertisement Annex. 1 that application once submitted with all the relevant documents will not be allowed to be changed in any manner. Production of original documents at the time of interview does not affect grant of marks. Either on the basis of photocopies of the documents, no marks could be awarded to the respondent No. 3 at all or relying upon those photocopies, if marks were to be awarded, then they should have been awarded on 3.6.2005 as well, even in absence of original documents. The respondents have also not pleaded the said reason of bifurcation

of marks in three headings regarding ready availability of finance in column No. (vi) of the guidelines in Annex. 4 and 5 as the reason for difference of marks to respondent No. 3. Yet assuming for argument sake that this difference was caused on account of production of original documents on later date by the respondent No. 3, the same in the opinion of this Court could not alter marks of respondent No. 3. The production of original documents was only for verification and authentication of papers already submitted and said production of original documents could not alter the marks to be awarded. Similarly, if same project report could yield only 2 marks in column No. (x) on 3.6.2005 for said respondent No. 3, how could those marks can go upto 3 on 11.6.2005. Similarly, the difference in marks in column (xiv) relating to business ability and acumen rising from 2.5 to 5 for respondent No. 3 is also not supported by any plausible reason or explanation. The petitioner who not only marched much higher than respondent No. 3 in ready availability of finance, 20 marks as against 18 marks to respondent No. 3 and educational qualification column No. 8-15 marks as against 10 was thus deliberately pushed down by the Selection Committee on 11.6.2005 marginally by less than 2 marks 86.9 to respondent No. 3 as against 85.1 to the petitioner.

12. Of course the Selection Committee had discretion to award marks upto maximum marks allocated in different headings as per the guidelines contained in the comparative marksheet Annex. 4 and 5, but such difference cannot be made arbitrarily and whimsically. When decision making process of Selection Committee is called in question in the Court of law, it becomes incumbent upon the respondent-Company to satisfy conscience of the Court that such difference was not caused on account of any extraneous or irrelevant consideration. Though the petitioner had not participated for Neemuch Road outlet on 3.6.2005, but had applied and appeared in interview only on 11.6.2005 for Kelwa outlet and therefore, comparative figures of these two different persons in both the interviews is not available, yet the comparative figures of respondent No. 3 who had applied and appeared for both these outlets is readily available on record.

13. Having gone through this record and comparative award of marks under different headings in consonance with conditions of advertisement and guidelines for award of such marks contained in Annex. 3, this Court is satisfied that the decision of Selection Committee of the respondent-Company to award said outlet of Kelwa in pursuance of interview held on 11.6.2005 in favour of respondent No. * 3 is arbitrary and smacks of extraneous reasons, having gone into such decision making process. This in ex-facie and without any hair splitting exercise. The difference in marks of respondent No. 3 for these two dates is thus found to be without any reasonable basis or nexus.

14. The decision cited by the learned Counsel for the respondents in the case of Mrs. Shakun Arora v. Union of India and Ors. reported in 2006(1) CDR 694 : 2006(1) RLW 55 is not applicable to the facts of the present case. In that case, the Court found that marks awarded were as per the norms fixed by the

respondent-Company and therefore, the Court held that in exercise of powers of judicial review under Article 226 of the Constitution of India, the Court could not re-appreciate the suitability of the petitioner. In that matter, the petitioner challenged award of lesser marks than maximum marks according to the criteria and the Court held that award of maximum marks depended upon the questions asked in the interview and verification of documents and therefore, the petitioner could not insist upon award of maximum marks and thus, the petition was found to be devoid of merit. In the present case, facts are otherwise. Here the petitioner has challenged the award of more marks to respondent No. 3 for extraneous reasons and has only questioned the fairness of decision making process in the limited scope available to the petitioner under Article 226 of the Constitution of India. Thus, burden of showing fairness of such decision making process and prima facie satisfying the Court by justification of award of marks in particular categories to the same respondent who applied and appeared for two interviews with a difference of short span of period of 8 days only, is on the respondent-company BPCL. There is no dispute from the side of the private respondent that same set of documents were available with both the applications for both these outlets in question. In other words, it is not the case of the respondents either the BPCL or the private respondent No. 3 that different documents or project report or papers relating to availability of finance etc. were made available for two different outlets on 3.6.2005 and 11.6.2005. Thus, apparently for same set of documents if the Selection Committee comprising of two different members, one being common in two selection interviews, cannot give marks at such varied level which ultimately results in pushing down the petitioner at marginally lower place to give him second rank in over all list.

15. Thus, the present writ petition deserves to be allowed and the same is accordingly allowed. The allotment of outlet of Kelwa (NH 8) Dist. Rajsamand in pursuance of interview by the Selection Committee held on 11.6.2005 in favour of respondent No. 3 is set aside. The petitioner thus, becomes entitled to be given the said retail outlet at Kelwa being next in merit. The respondent No. 2 - Company shall accordingly undertake requisite formalities for execution of agreement with the petitioner being at serial No. 2 in the said list for aforesaid outlet at Kelwa for award of said retail outlet to the petitioner. The said exercise in this regard by the respondent-company may be made within a period of one month from today.

With these observations, the writ petition is allowed with no order as to costs.