

(2013) 03 CAL CK 0072
In the Calcutta High Court
Case No : W.P. No. 962 of 2013

Rananjoy Bhattacharya

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-03-2013

Acts Referred:

Citation : (2014) 2 CHN 695

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Aniruddha Bose, J.—The controversy involved in this proceeding arises out of a selection process initiated by a notice published by the Hindustan Petroleum Corporation Ltd., (HPCL) inviting applications for appointment of dealers in respect of various retail outlets for petroleum products in different parts of this State. The dispute in this proceeding relates to a location disclosed against serial No. 21 in the list of sites disclosed in the advertisement. The location is described as "Bhojerhat between KM stone 15-17 on SHS" in the district of 24-Parganas (South). The requirements which individual applicants were required to fulfill were disclosed in the said notice itself in a form of notes. In this proceeding, the subject of controversy revolves around Clause VII of these notes relating to location requirement. This clause stipulates:--

"vii In case the land offered is on National Highway, the same should meet the NHAH guidelines contained in Govt. of India, Ministry of Road Transport & Highways No. RW/NH-33023/1999-DO-III dt. 25.09.03/17.10.03 and further amendments if any, failing which the offered land will not be considered for evaluation as above and the candidate will be treated at par with those candidates who have not offered land. The offered site should also meet IRC 12/2009 and norms of statutory bodies like forest, explosive etc. and land should be convertible for commercial and petrol pump use."

The respondent No. 8 had been selected for this retail outlet and notice of appointment has been given to him. The writ petitioner alleges that selection of respondent No. 8 was improper in that there was no compliance of the provisions of IRC 12/2009 pertaining to the site offered by the respondent No. 8. IRC 12/2009 is the title given to guidelines for access, location and layout of a roadside fuel stations and service stations formulated by the Indian Roads Congress in the year 2009. No specific violation of individual norms contained in the IRC 12/2009 has been pointed out in the writ petition. In course of hearing, however, learned counsel for the petitioners sought to make out a case that there was violation of Clause 4.5.1 of this Code which stipulates: "4.5 In order to provide safe length for weaving of traffic, fuel stations along highways/roads shall be located at the minimum distance from an intersection (gap in the central median be treated as intersection), as given below. For single carriageway section, these minimum distances would be applicable for both sides. All the distances shall be measured between the tangent points of the curves of the side roads at intersections/the median openings and the access/egress roads of the fuel stations, as is applicable, in a direction parallel to the centre line of the nearest carriageway of the highway. The above mentioned distances are applicable for setting up of fuel stations along National Highways, State Highways and Major District Roads. In case of fuel stations along the Rural Roads in plain and rolling terrain, the distance from the intersections with NHs/SHs/MDRs can be reduced to 300 m in place of 1000 m depending on the level of traffic.

2. Prior to filing of the writ petition, query was raised by the petitioner with the special Public Information Officer ADM(G) office of the District Magistrate, South 24-Parganas under the provisions of section 6 of the Right to Information Act, 2005 seeking information on various counts pertaining to selection in respect of the retail outlet at the said location. Two of these queries could be connected to the stipulations of Clause 4.5, which are.

"4. Who is the authority for carrying out measurement of the distance from aforesaid site on Basanti Highway (State Highway III) to Bhojerhat intersection and whether such measurement been carried out by the said authority? Kindly provide certified copies of documents. 5. Whether IRC: 12-2009 being Guidelines for Access, Location and Layout of Roadside Fuel Stations and Service Stations (3rd Revision) framed by the Indian Roads Congress, been considered?"

3. There was no specific reply to these queries but, the matter was endorsed to the "Special L.A.O." of the district by the Additional District Magistrate with a copy of the communication marked for the petitioner. As the petitioner did not get any response, he filed a further complaint with the Appellate Authority. In the Writ Petition, there is no indication as to whether any information was disclosed by the Appellate Authority or not. In course of hearing, however, the petitioner has come with a specific complaint that the aforesaid location of the retail outlet is within thousand meters of an intersection point on the State Highway. At the initial stage, the maintainability of the petition was questioned, and it has been

urged by the respondents that the petitioner has no locus standi to bring this action as he was a business rival to the selected candidate. On behalf of the oil company, again at the initial stage it was urged that the IRC norms to be followed were in respect of retail outlets located on the National Highways only. This was the construction sought to be given to Clause VII of the advertised norms, to which I have referred to in the earlier part of this judgment. Subsequently, however, the oil company changed their stance and in a supplementary affidavit affirmed by one Zakir Hossain Molla, the Chief Regional Manager of the oil company, it has been conceded that the aforesaid IRC norms was applicable to all National Highways, State Highways and District Highways as well.

4. On the question of locus of the writ petitioner, it was sought to be established by the petitioner that he was desirous of establishing a retail outlet at the said location but because he could not apply in response to the advertisement as the land he could offer within the advertised location was within the prohibited distance stipulated in Clause 4.5.1 of the aforesaid IRC norms. In a supplementary affidavit affirmed by him on 2nd August, 2010, he has indicated that he was offered land in that location but could not progress in view of the distance restriction contained in the IRC norms. He has also stated in this affidavit that he had investors who were willing to extend to him the support for establishing a retail outlet in that location. Learned counsel on behalf of the petitioner has drawn my attention to a letter issued by the Additional District Magistrate 24-Parganas (South) to the oil company on 4th June, 2010, requesting the company to submit permission and agreement from the competent authority of the Public Works Department that the selected site conformed to the aforesaid specification. In this matter, records were directed to be produced by the State, from where it appears that no objection certificate followed by a selling certificate on 30th April, 2012, in favour of the selected candidate were issued by the District Magistrate.

5. The question I shall deal first is as to whether the petitioner has the locus to maintain this writ petition or not. Relying on two judgments of the Hon'ble Supreme Court, *The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others*, & *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, it has been argued on behalf of the respondents that to maintain a writ petition under Article 226 of the Constitution of India, the applicant must have legal right, and a business rival does not have any legal right to question permissions or no objections granted to another trader, even if such grant is in violation of statutory provisions. In both these cases, complaints of violation of statutory rules were not taken cognizance of by the Supreme Court as the complainants were trade rivals. On the other hand, on behalf of the petitioner, reference has been made to the decision of the Supreme Court in the case of *M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others*, Considering the above referred two judgments of the Supreme Court, as well as several other authorities on the point of right to sue, it has been held in this judgment:--

"14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits."

6. This principle was reiterated by the Supreme Court in a later judgment, *Sai Chalchitra Vs. Commissioner, Meerut Mandal and Others*, The ratio of this judgment has also been followed by a Division Bench of this Court in the case of *Bimal Barman and Others Vs. The State of West Bengal and Others*, In this judgment, it was held by the Division Bench that guardian of a ward studying in a school had the locus to question the appointment of a teacher in the same school on the ground that he did not fulfil the eligibility criteria. On behalf of the petitioner, the judgment of the Supreme Court in the case of *Mehsana District Central Cooperative Bank Ltd. and Others Vs. State of Gujarat and Others*, was also referred to. It has been held in this judgment:--

"16. In the facts and circumstances stated above, the High Court by the impugned order issued a writ of mandamus, directing Respondents 4 and 5 to take appropriate action against the appellants in accordance with the provisions contained in the Gujarat Cooperative Societies Act and the Rules framed thereunder. We do not see any infirmity in the impugned order. The acts and Rules are made to be followed and not to be violated. When the statute prescribes the norms to be followed, it has to be in that fashion. Converse would be contrary to law. If there is any allegation of violation of statutory rules which have been brought to the notice of the authorities and if the authorities concerned do not perform their statutory obligation, as in the present case, any aggrieved citizen can always bring to the notice of the High Court the inaction of the statutory authorities and in such event it would always be open to the High Court to pass an appropriate order as deemed fit and proper in the facts and circumstances of the case. In the present case, the facts as alluded above, would clearly reveal that the High Court was clearly justified in issuing a writ of mandamus, which cannot be faulted."

(emphasis added)

7. Learned counsel for the petitioner contended that the oil company had no power to relax the eligibility criteria after publication of the advertisement, as in such cases many persons coming within the relaxed criteria would have been deprived of their right to participate in the selection process. In the event there was post-publication relaxation of eligibility criteria, a person who did not respond to the advertisement as he was not fulfilling the eligibility criteria could approach the Court questioning such relaxation. Supreme Court in the case of

Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, was relied upon by him on this point:--

"34. It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, respondent 1 was not entitled to act arbitrarily in accepting the tender of respondents 4, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years" experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by respondent 1 was discriminatory having no just or reasonable relation to the object of inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd Class restaurant at the airport. Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, respondent I was not entitled to depart from it and to award the contract to respondents 4 who did not satisfy the condition of eligibility prescribed by the standard or norm, if there was no acceptable tender from a person who satisfied the condition of eligibility, respondent 1 could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norms, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of respondent 4. When respondent 1 entertained the tender of respondents 4 even though they did not have 5 years" experience of running a IInd Class restaurant or hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years" experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with respondents 4 for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years" experience. The action of respondent 1 in accepting the tender of respondents 4, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of respondents 4 was, in the circumstances, invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

8. A Division Bench judgment of the Orissa High Court in the case of Dilip Kumar Prusti Vs. Collector and District Magistrate, Sambalpur and Others, was also cited on behalf of the petitioner, in which it has been observed:--

"Sri Y. Mohanty, learned counsel for the petitioner assailing the grant of "No Objection Certificate" has submitted that he has no grievance with regard to resitement but he is aggrieved with regard to the mode and manner of

resitement. He is aggrieved because of carrying out of resitement in contravention of the procedure. He fairly concedes that once the Indian Oil Corporation has agreed on principle for resitement, he cannot challenge and to that extent the petitioner has no locus standi. But, it is his submission that his Company has not conceded to the place of resitement and therefore, he cannot be denied the right to challenge the same as he is substantially affected and becomes a person aggrieved. We find that the decision of the Oil Companies is that they had agreed on principle for the resitement of O.P. No. 4 outlet but in actuality no place was mentioned. In absence of fixation of a specific place by way of resitement, it cannot be presumed that an unanimous decision by all the Oil Companies agreed to resitement subject to fixation of the place in accordance with the norms governing the field. If the installation or fixation is contrary to the norms and by such contravention if the petitioner is affected, indubitably, he becomes a person aggrieved and thereby has the locus standi to challenge such grant of "No Objection Certificate", as such a grant alone can give rise to installation."

9. In the instant case, complaint of the petitioner is that he was denied a level playing field as there was departure from the publicized norm to accommodate the petitioner. On the question of locus, in the case of Jasbhai Motibhai Desai (supra), an existing owner of a cinema theatre applied before the High Court invoking the Court's Constitutional Writ jurisdiction for quashing a no-objection certificate granted to another person seeking to establish a similar theatre in the same locality. The complaint was on the ground of breach of certain Rules. When initially objections were invited from the general public, the applicant did not lodge any complaint. In the case of Nagar Rice & Flour Mills (supra), again, an existing rice mill owner was complaining against permission given to another person to set up a rice mill in the vicinity of the former's mill. It was in the factual context the Supreme Court held, in the case of Jasbhai Motibhai Desai (supra), following the earlier authority of Nagar Rice & Flour Mills (supra):--

"47. Thus, in substance, the appellant's stand is that the setting up of a rival cinema house in the town will adversely affect his monopolistic commercial interest, causing pecuniary harm and loss of business from competition.

Such harm or loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Juridically, harm of this description is called *damnum sine injuria*, the *injuria* being here used in its true sense of an act contrary to law. The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.

48. In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to

something. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore he is not a "person aggrieved" and has no locus standi to challenge the grant of the no-objection certificate."

10. The other point argued by the petitioner was that the oil company had no power to relax the rules. It was submitted on behalf of the petitioner that in the absence of specific provision empowering the oil company to relax the norms, it was not permissible on their part to alter the location norm. The authorities relied on this point was judgment of the Supreme Court in the case of Sanjay Kumar Manjul Vs. The Chairman, UPSC and Others, and Bedanga Talukdar Vs. Saifudaullah Khan and Others, In the case of Mehsana District Central Cooperative Bank Ltd., & Ors. (supra) the aforesaid observation was made in connection with a public interest litigation. But, in the instant case, the petitioner has been able to demonstrate violation of his legal right against discrimination. The ratio of the decisions of the Supreme Court in the cases of Jasbhai Motibhai Desai (supra) and Nagar Rice & Flour Mills (supra) do not apply in the facts of the present case. The petitioner here is not an existing owner of a retail outlet objecting to setting up of a new outlet, on fear of loss or prejudice on account of competition. The petitioner is a potential applicant for a retail outlet who could not fulfil the advertised location criteria. After selection process is over, he has come with a complaint that the location criteria had been relaxed. If his allegation is found to be correct, that would result in direct discrimination, resulting in a situation which the Supreme Court found arbitrary in the case of Ramana Dayarm Shetty (supra). If norm is prescribed in the advertisement for selection, and subsequently there is departure from that norm then those who were excluded from participation in the selection process for not satisfying such norm in my opinion, would be entitled to maintain an action so that he is able to complete with similarly placed rivals.

11. On behalf of the private respondent it was argued that it is permissible on the part of the selecting body to relax non-essential norms. In this regard, an unreported judgment of a Division Bench of this Court delivered in MAT 128 of 2009 on 18th March, 2010, was relied upon. This judgment was delivered applying the principles evolved by the Supreme Court in the case of B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, . It was held in this case:--

"71. While saying no, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the

Court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior Courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ Courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

12. In this proceeding, however, I do not think the location specification is a non-essential condition. Compliance of the location norm was mandated in the eligibility criteria itself. In my opinion, the course prescribed ought to have been followed and the oil company had no authority to deviate from this Court. The ratio of the Supreme Court in the case of B.S.N. Joshi & Sons Ltd. (supra) does not confer carte blanche power to a selector to deviate from the selection norm. First, there ought to be substantial compliance of the eligibility criteria. Then deviation, if any, would have to be as per past practise. Thirdly, exercise of such power would be subject to judicial scrutiny on the tests of fairness, reasonableness and bona fide.

In the instant case, the oil company has not brought to my notice any past practise permitting such deviation from the location norms.

13. The question, however, arises now is as to whether the outlet for which appointment has been given to the respondent No. 8 actually offends any provision of the said Code and whether the minimum distance of 1000 meters from an intersection point on the State Highway has been breached or not. On behalf of the private respondents, it was urged that his outlet does not come within 1000 meters from any intersection point on the State Highway, though it may come within the aforesaid distance of a "T-junction". That measurement of the location of the private respondent's outlet from the nearest intersection point on the highway is not before me and I do not think the Writ Court ought to venture in to such factual controversy. On behalf of the State administration, who had given clearance for the site, no specific stand was taken before this Court on the point of compliance of IRC: 12-2009 norms by the office of the District Magistrate, in respect of the no-objection certificate issued.

14. In this matter, I have come to a finding that the petitioner is entitled to approach this Court with his complaint that there was post-advertisement relaxation of norms, and he would not be nonsuited on the ground of having no locus standi to agitate this cause. But as regards his actual complaint on merit, for the reasons disclosed in the earlier part of this judgment, it is not possible for me to actually come to a finding as to whether there has been any deviation from the disclosed norms in this case. Another authority, reported in Mukund Swarup Mishra Vs. Union of India (UOI) and Others, was cited, but I do not

consider it necessary to apply the ratio of this authority for adjudication of the present proceeding.

15. I accordingly dispose of this writ petition directing the Chief Engineer, Public Works Department, Government of West Bengal to measure the distance of the retail outlet of the respondent No. 8 from the nearest intersection point crossing through the State Highway and if it is found that the said intersection point is within the distance norm prescribed in IRC 12/2009, then appointment of the petitioner shall be terminated and there shall be fresh advertisement inviting applications for a retail outlet at that point. Otherwise, the appointment of the respondent No. 8 shall stand validated.

16. There shall be no order as to costs. Urgent certified photocopy of this order be made available to the parties, if applied for, subject to compliance with all necessary requisite formalities.