

(1997) 05 OHC CK 0013

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 3530 and 3531 of 1995

Sushanta Kumar Mohapatra and Narayan Pradhan

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-05-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (1997) 84 CLT 517 : (1997) 2 OLR 1

Hon'ble Judges : A. Pasayat, J;A. Deb, J

Bench : Division Bench

Advocate : Rabinarayan Acharya, B. Pujari and U. Mishra, for the Appellant;
A.G.A. for Opp. party Nos. 1 and 2 and Banamali Sahoo, for opp. party No. 4, for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, J.—These two writ applications are inter-linked and relate to selection of opposite party No. 4 in both the cases to open a 24 hours medical store at the Community Health Center, Jaleswar.

2. Background facts leading to filing of the writ applications essentially are as follows:

State Government of Orissa in the Health and Family Welfare Department took a decision to open a 24 hours medical store at the Community Health Center, Jaleswar. On the basis of decision taken, notice dated 31.3.1994 was issued by the Medical Officer of aforesaid Center inviting applications from intending persons. Criteria for selection were indicated. Sushanta Kumar Mohapatra, petitioner in OJC No. 3530 of 1995 makes a grievance that though he submitted an application on 5.4.1994, to the Under-Secretary to Government of Orissa, Health and Family Welfare Department (opposite party No. 2) through the Medical Officer of the Center concerned, his case was not properly considered and opp. party No. 4 has been selected. He is an unemployed registered

pharmacist having passed Diploma in Pharmacy, and opposite party No. 4 does not possess requisite qualification.

Narayan Pradhan, petitioner in OJC No. 3531 of 1995, has taken a stand that on 4.4.1994 he sent an application to the Under-Secretary to Government of Orissa, Health and Family Welfare Department through the Medical Officer. He has been working in a medical store since 1980, and has enclosed an undertaking from, a registered pharmacist that he would work in the shop of the petitioner. Bypassing his genuine claim opposite party No. 4 has been illegally selected.

3. State in the Health and Family Welfare Department has taken a stand that three Nos. of applications were received within the stipulated time. All the applications received were placed before the State Government for selection and on due consideration opp. party No. 4, who is¹ a woman, was selected. So far as petitioner Sushanta Kumar Mohapatra is concerned, it is stated that his application was received beyond the scheduled time, i.e. after 15.4.1994, and therefore, his case was not considered. He did not submit the application to the Under-Secretary as claimed. On the other hand it was routed through the then Minister of State, Health and Family Welfare Department who forwarded the application to the Joint Secretary, Health and Family Welfare Department vide Letter No. 492/MSWF, dated 10.6.1994. Selection of opp. party No. 4 was on the ground that she was a lady unemployed candidate.

Petitioner Sushanta by way of rejoinder has submitted that Government Order No. 17,782/H. dated 13.5.1993 stipulated that the Superintendent, C.D.M. and the Chief Medical Officer concerned shall at the outset assess the need for having a 24 hours medical store in the campus of his hospital. If the need is found to be imperative, he 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. As a matter of fact, in the present case the applications were invited by notifying only in the official notice board by the Chief Medical Officer, Jaleswar. Therefore, he could not know about the notification dated 31.3.1994, and could know only on 3.4.1994 and by arranging all necessary papers could apply on 5.4.1994, and sent application by post as evident from certificate of posting. There was violation of the mandatory requirement to publish the notice in the local dailies. It has been also indicated that opp. party No.4 is married and resides in her father-in-law's house beyond the limits of Jaleswar, and she cannot claim any privilege. Merely because his application was received beyond the date prescribed, on technical ground his case should not be thrown out without consideration.

The learned counsel for State submitted that considering the concerned aspects requirement of making publication in the newspaper was waived and the only requirement was to notify in the official notice board. Reference in this context is made to the notification of the State Government in Letter No. II-10-6/94-8993 dated 26.2.1994.

4. Consideration to be made while dealing with a case of this nature has to be in the background of scope of judicial review by the High Court in matters of administrative action and also grant of largess by the State Government, as grant of licence to run a 24 hour medical store is a largess.

The scope of judicial review in matters of administrative decisions have been highlighted by the Courts in many cases. In recent times the distinction between administrative orders and judicial or quasi-judicial orders have practically ceased to exist in view of primacy of the rule of law. The point that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that 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 the power is manifestly arbitrary (See *State of U.P. and Others Vs. Renuagar Power Co. and Others*, .). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action 4th Edition at pages 285-287 states the legal position in his own terms language that the relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes, alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. There several principles can be conveniently grouped into two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body in acts ultra vires.

The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features . of some of these recent cases signify the willingness of the Courts to assert their power to scrutinise the factual bases upon which discretionary powers have been exercised. Judicial review has developed to a stage today when, without reiterating any analysis of the steps by which the development has come about.

One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality", and the third "procedural impropriety. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Services* : (1984) 3 All ER 935. If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See *Commissioner of Income Tax, Bombay and Others Vs. Mahindra and Mahindra Limited and Others*, . The effect of several decisions on the question of jurisdiction have been summed up by Grahme Aldous and John Alder in their book "Applications for Judicial Review, Law and Practice" thus :

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* this is doubtful. Lords Diplock, Scotman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

(Also see *Padfield v. Minister of Agriculture, Fisheries and Food*: (1968) AC 997 and *Council of Civil Service Unions v. Minister for the Civil Service* (1984) 3 All ER 935 (HL). The Court must while adjudicating validity of an executive decision grant a certain measure of freedom or play in the joints to the executive. The problems of Government are practical ones and may justify, if they do not require, rough accommodations; illegal, it may be and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to judicial review. It is only palpably arbitrary exercise which can be declared void. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. While fair play is an essential ingredient in accepting and in awarding a contract, similarly "fair play in the

joints" is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

Discretion, Lord Mansfield stated in classic terms in John Wilke's case (1970) 4 Bur 2528, meant sound one governed by law and guided by rule, not by humour. Lord Denning put it eloquently in Breen v. Amalgamated Engineering Union : (1971) 1 All ER 1148, then in a Government of laws "there is nothing like unfettered discretion immune from judicial reviewability. Courts stand between the executive and the subject alert, to see that discretionary power is not exceeded or misused. Lord Brightman eloquently observed in the case of Chief Constable of North Wales Police v. Evans : (1982) 3 All ER 141 that :

"Judicial review, as the words imply is not an appeal from a decision, but a review of the matter in which the decision was made,"

In a recent decision of Tata Cellular v. Union of India (1994) 6 SCC 651 : AIR (1994) SCW 3344, the Apex Court classified the grounds of challenge as under (at pp 3368-3369 of AIR SCW)

"Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury, unreasonableness.

(iii) Procedural impropriety."

The action 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. The classic passage from the Judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation : (1948) 1 KB 223 eloquently states the position in law. The same reads as follows :

"It is true the discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable in a rather comprehensive sense. It has frequently been used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in (sic). He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting

"unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

These guidelines have been stated in *Geetanjali Patnaik Vs. State of Orissa and Others*, : and in *Purna Chandra Panda Vs. Government of Orissa and Others*, . The ultimate standard of review is a narrow one. The Court is not empowered to substitute its own Judgment for that of the authority taking the decision. (See *Citizens to Preserve Over toil Park y. John A. Volne* : U. S. Supreme Court Reports 40 1 U.S. 402:

5. A person having previous experience of running a medical store shall be given preference if he can furnish documents in support of that. But he will get lower priority vis-a-vis an applicant who is a registered pharmacist. The criteria for selection have been indicated in the Government letter dated 13.5.1993 at para. 5 read as follows :

"5. The criteria for selection shall be as follows :

(i) Any person having the requisite qualification may apply for running a medical store in Government Hospital.

(ii) A person to be considered eligible for the purpose shall preferably be a 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 also be considered.

(iii) A person having previous experience of running a Medical Store shall be given preference if he can furnish documents in support of that. But he will get lower priority vis-a-vis applicant who is a registered pharmacist.

(iv) All other things being equal, persons who have crossed the age-limit for entry into Government service shall be given preference."

6. From the records produced, it is seen that the last date for submission ; of application was 15.4.1994. Admittedly the application filed by petitioner Sushanta was received after the last date. Therefore, his application could not have been considered and has been rightly kept out of consideration, even if his case was recommended by the then Minister of State, Health and Family Welfare. Writ application (OJC No. 3530 of 1995) filed by him is dismissed.

7. Coming to the writ application filed by Narayan Pradhan, it is seen from the records that the application of three persons, namely. Sushanta Kumar Mohapata, Narayan Pradhan and Sumatibala Das which were received within the prescribed time were considered. Sushanta was unemployed, but did not furnish any document to show that he was willing to engage a pharmacist. He only indicated to have experience of running medical store. He made a declaration to abide by conditions laid down in notification dated 13.5.1993.

Petitioner Narayan furnished documents to show that he was willing to engage a pharmacist. He, however, did not furnish any document to show that he had

previous experience of running a medical store. It was only indicated in the application that he had such experience.

Sumitabala filed necessary documents. The records reveal that the consideration for selecting her was that she fulfilled the requisite conditions.

8. Criteria for selection are indicated in paragraph 5 of the letter dated 13.5.1993. A bare reading of the conditions contained therein, the position is crystal clear that a person to be considered eligible for the purpose shall preferably be a pharmacist either with a degree or diploma in pharmacy, A person having previous experience of running a medical store shall be given preference if he can furnish documents in support of that. But he will get lower priority vis-a-vis applicant who is a registered pharmacist. A person who can engage a pharmacist irrespective of whether he himself is a pharmacist or not may also be considered. All other things being equal persons who have crossed the age-limit for entry into Government service shall be given preference.

9. In view of the factual position detailed above, the inevitable conclusion is that while the petitioners did not submit all the requisite documents, Sumatibala filed them. Consideration of the applications and the documents revealed that she fulfilled all the requisite conditions. The decision-making process cannot be said to be vitiated and there is no scope for interference in the writ application (OJC No 3531 of 1995) filed by Narayan.

Both the writ applications deserve dismissal which we direct. No costs.

A. Deb. J.

10. I agree.