

(1993) 08 OHC CK 0023

In the Orissa High Court

Case No : Original Jurn. Case No. 9607 of 1992

Suvendra Kumar Pattnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-08-1993

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1994 Ori 41

Hon'ble Judges : G.B. Patnaik, J;B.N. Dash, J

Bench : Division Bench

Advocate : J. Patnaik, for the Appellant; B. Routray, Additional Government Advocate, B.B. Mohanty, D.P. Dhal and A.K. Acharya, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The order passed by the State Government in favour of opposite party No. 5 to open a 24 hours medicine store in the campus of the Sub-Divisional Hospital, Kamakhyanagar, is the subject-matter of challenge in this writ application.

2. The petitioner's case, in brief, is that an advertisement was issued in daily "Sambad" dated 27-11-1991 inviting applications from the intending persons for opening of a day and night medicine store in the premises of the Sub-Divisional Hospital, Kamakhyanagar, and applications were required to be filed within fifteen days from the date of publication of the advertisement. The advertisement has been annexed as Annexure-1. In pursuance of the advertisement, the petitioner submitted his application in the prescribed pro forma within the stipulated time, copy of which has been annexed as Annexure-2. Along with the petitioner, 25 others had submitted their applications pursuant to the advertisement under Annexure-1 and it has been averred that opposite party No. 5 was not one of the applicants. The Government in the Health Department had issued a circular dated 10-7-1991 indicating the procedure to be followed for selecting persons for opening such medical shops. The said circular has been

annexed as Annexure-3. The circular contains the criteria for selection as well as the procedure to be followed. In accordance with the said procedure, the Chief District Medical Officer in consultation with the Hospital Advisory Committee was required to send the names of 3 persons in order of preference giving reasons for such placement to the Director of Health Services of Director of Medical Education and Training, as the case may be, for a final decision. In accordance with the aforesaid prescribed procedure, the Hospital Advisory Committee in respect of Kamakhyanagar Sub-Divisional Hospital met on 25-9-1992 and discussed the merits of all the applicants and recommended the name of the petitioner along with two others in order of preference and the petitioner's name found place at serial No. 1. The said recommendation has been annexed as Annexure-4. That recommendation had been made to the Director of Health Services. Though under the prescribed procedure, the Director of Health Services was to take a final decision in the matter, but to the utter surprise of the petitioner, it is the Government in the Health Department took the final decision in the matter and selected opposite party no. 5 as per Government letter dated 18th of December, 1992, annexed as Annexure-5. On the basis of the aforesaid Government order under Annexure-5, opposite party No. 3 made a communication to opposite party No. 4 indicating that opposite party No. 5 has been selected for opening of the medicine store which order has been annexed as Annexure-6. The petitioner further avers that the prescribed procedure which had been issued on 10-7-1991 under Annexure-3 was substituted by Government Circular dated 18-11-1992, annexed as Annexure-7, legality of which is also challenged in the writ petition. It is contended that when the advertisement was issued and when applications were filed and further when the applications were considered, Annexure-3 was in force and, therefore, the final decision should have been taken in accordance with the said Annexure-3. The revised procedure cannot have any application to the facts and circumstances of the present case. According to the petitioner, the entire procedure was changed just to allot the shop to opposite party No. 5 and the said decision, therefore, is vitiated.

3. A counter affidavit has been filed by the Under Secretary to the Government of Orissa in Health Department on behalf of opposite party No. 1 and the stand taken in the counter affidavit is that the revised procedure having come into force since 18-11-1992 and no decision prior to that date having been taken with regard to the allotment of the 24 hours medicine store at Kamakhyanagar, the Government took the final decision in accordance with the revised procedure. It is also contended that the petitioner was even otherwise not eligible to be selected in accordance with the old procedure. An averment has also been made that there was no Advisory Committee existing to make the recommendation in question.

On behalf of opposite party No. 5 also a counter affidavit has been filed denying the allegations made in the writ petition and it has been contended that since opposite party No. 5 had the qualification as a pharmacist and he fulfilled all the

norms and conditions, he has been duly selected by the State Government in accordance with the prescribed procedure. The said opposite party No. 5 has made an assertion that the local M.L.A. had pressurized the local officers to give a recommendation in favour of the petitioner and that is the reason why even though the petitioner did not have the prescribed qualification, yet the recommendation had been made in his favour.

The Establishment Officer of the Directorate of Health Services has also filed a counter affidavit on behalf of opposite party No. 2. It has been stated therein that pursuant to the advertisement issued, applications were received by the C.D.M.O. and those applications were placed before the Hospital Advisory Committee on 25-9-1992 for taking a decision in the matter and in accordance with the decision of the said Advisory Committee, the petitioner was at serial No. 1. But since the Government in the Health Department desired, the entire file dealing with the subject along with the recommendation of the C.D.M.O. was sent to the Government and then all the original applications were also sent to the Government and in view of the Government order, opposite party No. 5 has been permitted to open the shop in question. It has also been stated in the said counter affidavit that in view of the revised procedure for consideration issued on 18-11-1992 substituting paragraph 4 (iv) of the earlier circular dated 10-7-1991, it is the State Government who has the power to decide and accordingly the State Government has decided and thus there is no infirmity with the decision taken on behalf of the petitioner, a rejoinder affidavit has been filed denying the allegations made in some counter affidavit that the local M.L.A. had pressurized the local officer to make the recommendation in favour of the petitioner.

4. In course of hearing of the writ petition, learned Additional Government Advocate produced before us the file dealing with the settlement of the shop to indicate that there has been no unfair deal in the matter and the entire matter has been processed in accordance with law. A scrutiny of the file indicates that in pursuance of the advertisement issued in "Sambad" on 27-11-1991, 27 applications have been received by the C.D.M.O., Dhenkanal, who, in turn, had sent the same to the S.D.M.O., Kamakhyanagar, for obtaining the opinion of the Advisory Committee of the Hospital. As there was no advisory committee of the Hospital, the C.D.M.O., Dhenkanal, sent all the forms to the Director of Health Services on 14-8-1992. The Director of Health Services again remitted back all the applications to the C.D.M.O. to place the same before the Hospital Advisory Committee in accordance with the principles prescribed in the Government Circular dated 10-7-1991. Government having found that there has been no Advisory Committee in the Hospital issued instructions to the Director of Health Services to call for all the applications sent to the C.D.M.O. and to finalise the matter by the Director herself. This is apparent from the note-sheet of the Joint Secretary to the Government in Health Department in the notes dated 18-9-1992 at page 23h. The said Joint Secretary had put up a note to the Secretary to Government in the Health Department indicating that since no Hospital Advisory Committee is existing, a decision may be taken at the Government level as to

whom the C. D.M.C. would consult in drawing-up a panel of three names in order of preference, pending formation of such Committee. The Secretary had passed an order that if there does not exist any Hospital Advisory Committee, then the C.D.M.O. should record the same and send it to the Director of Health Services/ DMET on whom the final decision rests. This order of the Secretary to the Government is dated 4-10-1992. While the matter stood thus, opposite party No. 5, Subash Kumar Pattnaik, filed a representation before the Minister, Health, on 30-7-1992 and on the said application the Minister, Health and Family Welfare Department, had made an endorsement to the Joint Secretary, Health to the effect "recommended for needful action". The said Subash Kumar Pattnaik appears to have made another representation in September, 1992, to the Minister, Health and that application was also recommended by the Minister by making an endorsement thereon to the effect. "Joint Secretary, Health -- For needful action". These two representations are there on pages 21/c and 24/c of the concerned file. The Private Secretary to the Minister of Health issued a letter to the Director of Health directing the Director to send the original files regarding opening of 24 hours medical store in the hospital at Kamakhyanagar to the Government and the Director of Health accordingly submitted the said files to the Joint Secretary to the Government, Health Department with a request that the files may be returned back to the Directorate when done with. This is apparent from the letter of the Director of Health Services dated 2-9-1992. While submitting the file to the Government, the Director of Health Services had indicated that three names in order of preference had been recommended by the C.D.M.O. and on receipt of the files from the Government, level, action would be taken as would be proper. The Government then called for the original applications filed by the persons concerned for the shop in question and the Director then submitted the original applications, 26 in number, together with all documents and certificates along with a list of the applicants. At that point of time, the Government in the Health Department issued a revised procedure for disposal of applications for opening of medical stores in Hospitals on 18-11-1992 and under the revised procedure, the final decision lay with the Government by which revised procedure, paragraph 4(iv) of the Government Circular dated 10-7-1991 was substituted and under the revised procedure, the C.D.M.O. will send all applications received with his comments to the Director of Health Services/ D.M.E.T., as the case may be, who, in turn, shall forward the same to the Government along with their views/comments for a final decision. The Government being of the view that selection should be made in accordance with the revised circular examined the applications and the Under Secretary to the Government had put up a note indicating that in terms of the revised circular, the views of the Director of Health Services are necessary for a decision at the Government level and the views of the Director had not been received. Since by then the litigation in relation to grant of medical store in the M.K.C.G. Medical College had been pending, the said Under Secretary had indicated in the said note :--

"The litigation involving grant of medical store in M.K.C.G. Medical College is a sufficient warning for processing these cases in accordance with the procedure laid down in executive instructions and any deviation will invite litigations."

and, therefore, suggested that the views of the Director of Health Services may be called for in the first instance. The Joint Secretary, however, ignoring the aforesaid suggestion in his note had indicated :--

"....It is of no use to refer it back for views/ comments, as it will only take time without any fruitful result."

and thereafter considered the relative merits and suggested that selection should be made finally from amongst the four registered pharmacists, who were Subash Kumar Pat-naik, Biroda Kumar Panda, Sudarsan Choudhury and Anil Kumar Sinha. The Minister finally selected Subash Kumar Patnaik and thereafter Government order was issued. On the file, where Minister has passed the order, there has been a pasting high suggests that possibly some other order had been passed which has been changed later on.

5. Mr. Patnaik, the learned counsel for the petitioner, raises the following contentions in challenging the selection made by the Government :--

(i) On the date when the advertisement was issued as well as on the date when the applications were received for selection, the prescribed procedure was as contained in the Government Circular dated 10-7-1991 which conferred the final authority to take a decision on the Director of Health Services or the Director of Medical Education & Training, as the case may be. Even though the Government revised the procedure in November, 1992, the revised procedure should have no application and, therefore, the Government had no jurisdiction to take a final decision in the matter;

(ii) The revised procedure was issued just to confer certain benefits on opposite party No. 5 and, therefore, the said revised procedure should be struck down;

(iii) Even in accordance with the revised procedure, the selection has not been made, inasmuch as there has been no recommendation from the Director of Health Services and, therefore, the ultimate decision is vitiated; and

(iv) The entire exercise was made because of a representation made by opposite party No.-5 and because of the order of the Minister thereon and, therefore, the decision to settle the shop with opposite party No. 5 cannot be said to be a fair decision of the competent authority.

Learned Additional Government Advocate appearing for the State as well as the learned counsel appearing for opposite party No. 5, on the other hand, contends that since opposite party No. 5 was a registered Pharmacist, he was to be preferred in the matter of selection in accordance with the procedure and since the procedure was changed before a final decision had been taken, the revised procedure must be made applicable. So far as the other two contentions of Mr.

Patnaik are concerned, the learned Additional Government Advocate submits that the said contentions have no basis and should be rejected.

6. In view of the rival submissions, the first question that arises for consideration is whether the revised procedure that was issued on 18-11-1992 would at all apply in the case in hand so that Government will have the final say in the matter. Mr. Patnaik for the petitioner relies upon the decision in O. J. C. No. 7874 of 1992 (B. Dandapani Patro v. State of Orissa) disposed of on 24-12-1992 wherein this Court has held that under the Circular dated 10-7-1991, it is the Director of Health Services or the Director of Medical Education and Training, who has to take a "final decision" and the State Government has no role to play. Since the State Government had issued the order in that case, the said order was quashed. But in the aforesaid case, the revised procedure issued on 18-11-1992 had not come into force when the Government took the decision on 28-10-1992 and, therefore, under the existing procedure, the Court rightly held that the Government had no role to play. There is no dispute with the proposition that for doing anything if a procedure is laid down, then the thing has to be done in accordance with that procedure or not at all. This is the settled law since the decision of the Privy Council in the case of AIR 1936 253 (Privy Council) on which the earlier Bench decision in O. J. C. No. 7874 of 1992 relied. But if no final decision had been taken and the procedure for taking a decision is changed, then the changed procedure can be made applicable, as the procedural law always becomes applicable on the date such procedure is made. In the case in hand, since no final decision had been taken in accordance with the Government Circular dated 10-7-1991, though applications had been invited and certain recommendations had been made and since the revised procedure came into force on 18-11-1992 and by that date no decision had been taken, it is the revised procedure that should be made applicable. So, the Government is right in applying the revised procedure to decide the matter of settlement. We see no infirmity with that part of the order of the Government. The first contention of Mr. Patnaik for the petitioner, therefore, cannot be sustained.

7. The next question that arises for consideration is whether the Government has decided the matter in accordance with the revised procedure? The answer must be in the negative. As has been noticed earlier, while discussing the notes in the concerned file, under the revised procedure, though Government has to take a final decision, but it is the C.D.M.O./C.M.O. and the Superintendent of Medical College Hospital who are required to send the applications received at their ends with their comments to the Director of Health Services/Director of Medical Education & Training, as the case may be, and the said Director of Health Services/ Director of Medical Education & Training in turn would forward the same to the Government in the Health and Family Welfare Department along with views and comments for a final decision. Admittedly, there were no comments or views of the Director of Health Services and, in fact, the Under Secretary to the Government had so indicated in his notes even giving a note of caution in view of the pending litigation in this Court in relation to the opening of

a day and night medical store within the medical college hospital campus at Berhampur. But the Joint Secretary to the Government was of the opinion that it was of no use to refer it back for views or comments as it would only take time without any fruitful result, and then proceeded with the matter to decide the question of settlement. We are really surprised to notice such attitude of the public officers who are bent upon not following the procedure in their haste to bestow the benefit in favour of some desired person. At any rate, there cannot be any manner of doubt that even the revised procedure has not been adhered to while taking a final decision with regard to the allotment of the shop in question and, therefore, applying the test laid down in Nazir Ahmad's case AIR 1936 PC 253 (2) which was followed by the Supreme Court in the case of Commr. of Police, Bombay v. Gordhandas Bhanji AIR 1992 SC 16, the conclusion is irresistible that the decision of the Government is vitiated for non-compliance of procedure and thus cannot be sustained and accordingly, the impugned decision under Annexure-5 is quashed.

8. The further question which crops up for consideration is whether, in fact, the matter had been dealt with fairly, or the matter has been processed just to select opposite party No. 5 and the rest is all an eyewash? On going through the relevant file that was produced before us and the notes and documents contained therein, we are persuaded to accept the submission of Mr. Patnaik for the petitioner that the matter has been processed with the object of conferring the settlement on opposite party No. 5 and, therefore, there has been no fair play in the matter of selection. As it transpires, when the procedure prescribed for such settlement contained in Government Circular dated 10-7-1991 was still in vogue and applications had been made which were being considered at the appropriate level and Government had no role to play therein, opposite party No. 5 had filed representation before the Minister, Health, and the Minister appears to have endorsed a recommendation for needful action to the Joint Secretary, Health, and the said Joint Secretary on 1-8-1992 had called upon the C. D. M. O. to furnish a detailed report to the Government in the Health Department. The said opposite party No. 5 made a further representation in September, 1992, and the Minister again made an endorsement to the Joint Secretary for needful action. Then the files as well as the applications were called for from the Director of Health Services in September, 1992, even when the revised procedure had not been issued. Then the matter was kept pending with the Government and the revised procedure was issued on 18-11-1992 and then "the matter was processed and finally opposite party No. 5 was selected. In the aforesaid circumstances, the grievance of the petitioner that there has not been a fair dealing with the matter and the entire matter has been processed with opposite party No. 5 being kept in view, cannot be said to be an unjustified one. On the other hand, it appears that the matter has not been dealt with fairly. But since we have already recorded the conclusion that the decision is vitiated for non-compliance of the procedure, we need not further hold an enquiry into the matter. In the aforesaid premises, the impugned decision under Annexure-5

quashed and the matter is remitted back to the Government for reconsideration of the matter in accordance with the revised procedure. The Government may now call for recommendations from the Director of Health Services and on receiving the same shall take a final decision in accordance with the revised procedure. Since this relates to opening of a 24 hours medical store at the Sub-Divisional Hospital at Kamakhyanagar, the matter should be disposed of with promptitude and the final decision may be taken within two months from the date of receipt of our order.

9. The writ application is accordingly allowed. There will, however, be no order as to costs.

B.N. Dash, J.

10. I agree.