

CONSTITUTIONAL WRIT**Present: The Hon'ble Justice Indira Banerjee.****W.P. No.21778 (W) of 2009****Judgment on: 05.04.2010****Smt. Bandana Saha**

Vs.

Indian Oil Corporation Ltd. & Ors**POINTS:**

BACK-DATED LETTER, EXPERIENCE-Petitioner not considered for issuance of Letter of Intent for award of Liquefied Petroleum Gas (LPG) distributorship-Necessary documents in support of experience, as claimed in the application form, neither produced by the petitioner nor obtained from the concerned employers-Pre-decisional hearing is the rule and post-decisional hearing the exception- Petitioner procured ante dated documents to strengthen her case whether plead for legitimate expectation - Constitution of India, Art. 226

FACTS:

In this writ application, the petitioner has challenged a communication dated 17th November, 2009 of Indian Oil Corporation informing the petitioner that the petitioner had not been considered for issuance of Letter of Intent for award of Liquefied Petroleum Gas (LPG) distributorship at Berhampore, District Murshidabad

HELD:

Had the correct facts relating to ownership of the land been disclosed, the petitioner might have been awarded lesser marks. Moreover a person who, whether by mistake or otherwise makes an erroneous statement renders his candidature liable to cancellation. Para-30

The decision not to issue letter of intent to the petitioner has not been taken only on the ground of an incorrect statement in application, but also on the ground that necessary documents in support of experience, as claimed in the application form, could neither be produced by the petitioner nor obtained from the concerned employers. Para-34

The principles of law are well-established and unexceptionable. Any action that has adverse civil consequences must be taken in compliance with principle of natural justice. There can be no doubt that an existing right, advantage or benefit cannot be curtailed without opportunity of hearing to those likely to be affected. Para-44

It is well-settled that the rule of pre-decisional hearing is not unexceptional. In exigencies necessitating immediate action, post-decisional hearing might suffice. There can, however, be no doubt that pre-decisional hearing is more effective than post-decisional hearing. Pre-decisional hearing is the rule and post-decisional hearing the exception. Recourse may be taken to post-decisional hearing in exceptional cases of grave urgency. Para-45

The petitioner was, however, only selected and empanelled. An empanelled candidate has no inherent right to be appointed. No vested right of the petitioner has been affected by the impugned decision. The petitioner was thus not entitled to pre-decisional hearing. Para-46

Incorrect averments in an application form certainly entail the consequence of cancellation of an application. The petitioner's claim to experience was rightly disbelieved, for a certificate issued by a so-called employer, who subsequently obliged the petitioner by

issuing a back-dated letter of appointment, is of no value, in the absence of supporting evidence.

Para-47

The petitioner has approached this Court with unclean hands. Manufactured documents have been annexed to her Affidavit. This Court is thus not inclined to entertain this application. The petitioner cannot be heard to complain of denial of legitimate expectation without recourse to natural justice, when she has procured ante dated documents to strengthen her case.

Para-48

CASES CITED:

1. H.L. Trehan vs. Union of India reported in 1989 (1) SCC 764 (770)
2. Ganpat Roy vs. Additional District Magistrate & Ors. reported in 1985 (2) SCC 307.
3. Institute of Chartered Accountants vs. L.K. Ratna reported in 1986 (4) SCC 537.
4. Council of Civil Service Unions & Ors vs. Minister for the Civil Service reported in 1985 (3) ALL E.R. 935 and
5. Tata Cellular vs. Union of India reported in 1994 (6) SCC 651.

For the Petitioners: Mr. Jayanta Kr. Mitra, Sr. Adv.
 Mr. D. Mukherjee
 Mr. S.K. Ghosh

For the respondents: Mr. M.S. Yadav
 Ms. Saswati Chatterjee

THE COURT:

5) In paragraph 10 of the writ petition, it is pleaded that one of the applicants for the distributorship, one Smt. Sarbani Datta, whose application had been cancelled on the ground that her affidavit was incomplete, filed a writ petition being W.P. No.14221 (W) of 2009 which was dismissed on 26th August, 2009 after protracted hearing.

6) According to the petitioner, since no steps were being taken for grant of LPG distributorship to the petitioner, the petitioner made numerous representations.

7) In response to the representations, the petitioner received the impugned letter dated 17th November, 2009 informing the petitioner that after field investigation, it was decided not to award the distributorship to the petitioner.

8) The grounds on which the decision not to allot the distributorship to the petitioner was taken as disclosed in the impugned communication (Annexure P-10) are extracted hereinbelow for convenience:

- “a) Necessary documents in support to experience as claimed by you in your application form could neither be produced by you nor be obtained from the issuing authorities.
- b) Land offered for the godown is not as per required specification. Moreover, the land is jointly owned for which no registered lease/partition deed is available.
- c) No agreement to sale/lease for the land offered for showroom for the proposed distributorship at Baharampur is available.”

9) Mr. Jayanta Kumar Mitra, Senior Advocate appearing on behalf of the petitioner submitted that the decision not to award the distributorship to the petitioner has been taken in flagrant violation of principles of natural justice, without giving the petitioner an opportunity of hearing.

10) Mr. Mitra submitted that the petitioner had been selected and empanelled in the first position, on the basis of the documents enclosed with her application for appointment as distributor. Originals of the documents were verified at the time of interview. It was thus not open to the respondents to reject the candidature of the petitioner after field investigation, on the purported ground that documents in support of experience as claimed by the petitioner in the petitioner's application could neither be produced nor be obtained from the issuing authorities, nor could the candidature of the petitioner now be rejected on the ground that the godown was not as per required specification.

11) Mr. Mitra further argued that the petitioner ought to have been given an opportunity, before the drastic decision not to issue Letter of Intent in favour of the petitioner was taken. The respondents were wrongfully, arbitrarily and mala fide nullifying the selection made by the Selection Committee and denying the petitioner the distributorship on frivolous grounds which might have been explained, had the petitioner been given opportunity of hearing.

12) In support of his submission that the petitioner should have been given opportunity of representation before the decision to reject the candidature of the petitioner was taken, Mr. Mitra cited the following judgments:

6. H.L. Trehan vs. Union of India reported in 1989 (1) SCC 764 (770)
7. Ganpat Roy vs. Additional District Magistrate & Ors. reported in 1985 (2) SCC 307.
8. Institute of Chartered Accountants vs. L.K. Ratna reported in 1986 (4) SCC 537.
9. Council of Civil Service Unions & Ors vs. Minister for the Civil Service reported in 1985 (3) ALL E.R. 935 and
10. Tata Cellular vs. Union of India reported in 1994 (6) SCC 651.

13) In H.L. Trehan vs. Union of India (supra) the Supreme Court held that there could be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice, by giving the Government servant concerned an opportunity of hearing.

14) The Supreme Court held that the circular impugned in the aforesaid case, which prejudicially altered the terms and conditions of service of employees, and thus resulted in civil consequences, could not be sustained, as the same offended the rules of natural justice.

15) The Supreme Court further held that post decisional opportunity of hearing does not sub-serve the rules of natural justice, for once a decision has been taken there is a tendency to uphold the decision and a representation may not yield any fruitful purpose. The authority who embarks upon a post decisional hearing is likely to proceed with a closed

mind and there is hardly any chance of getting a proper consideration of the representation at such post decisional opportunity.

16) In *Ganpat Roy vs. Additional District Magistrate & Ors.* (supra) the Supreme Court held as follows:

“From the very nature of things a right to defend an application in the first instance is a very different matter from right to seek a review of the order on that application or a right of appeal against that order. In its very nature and scope, an original hearing differs substantially from a review or an appeal. A party applying for review or an appellant cannot as of right lead evidence. Further, it is he who comes before the authority challenging an order passed to his prejudice and is not in the same position as the party against whom an order is sought in the first instance.”

17) In *Institute of Chartered Accountants vs. L.K. Ratna* (supra) the Supreme Court held that if natural justice was violated at the first stage, the right of appeal would not be a right of appeal, but a corrected initial hearing instead of fair trial followed by appeal. The procedure would be reduced to unfair trial followed by fair trial.

18) In *Council of Civil Service Unions & Ors vs. Minister for the Civil Service* (supra) the House of Lords held that decision making powers that had consequences on the private rights or legitimate expectations of other persons would render the decision subject to judicial review, irrespective of whether the decision making power was derived from statutory source or common law. The House of Lords held that decisions were subject to judicial control on the ground of illegality, irrationality or procedural impropriety. In *Tata Cellular vs. Union of India* (supra) the Supreme Court held that the decision making process was subject to judicial review.

19) Mr. M. S. Yadav, appearing on behalf of the Indian Oil Corporation, hereinafter referred to as IOC, pointed out that there were various stages for selection of dealers. The parameters for evaluation of eligible applicants are as follows:

a) Capability to provide infrastructure	35 marks
b) Capability to provide finance	35 marks
c) Educational qualifications	15 marks
d) Age	4 marks
e) Experience	4 marks
f) Business ability/acumen	5 marks
g) Personality	2 marks

20) The mode of allocation of marks are given in the brochure of the respondent Corporation for Selection of Indane Distributors. For example, of 15 marks for educational qualification a Matriculate or equivalent is entitled to 7 marks, a person who has passed the Higher Secondary is entitled to 8 marks, a graduate is entitled to 10 marks, a post graduate is entitled 12 marks. There is one mark for every additional qualification or diploma/degree. Persons with technical qualifications such as Management Graduates, Chartered Accountants, Cost Accountants, Engineers etc. are entitled to full 15 marks. Similarly the brochure lays down the guidelines for awarding marks for capability to provide finance.

21) Mr. Yadav submitted that at the stage one level, marks are allotted for capability to provide infrastructure, capability to provide finance, educational qualifications and age on the basis of information provided in the application form and marks for experience,

business ability/acumen and personality are awarded by the Selection Committee at the second stage on the basis of an interview.

22) After completion of the interview, a merit panel is prepared in order of merit, after which a field investigation is conducted in respect of the first candidate in the merit panel, for inter alia verification of the information provided in the application. If the first candidate is cleared upon field investigation, and there is no complaint pending or any order of stay of a Court of law, a Letter of Intent follows.

23) Referring to Paragraph 9 of the Brochure on Selection of Indane Distributors, Mr. Yadav argued that if upon physical verification, it is found that any false information has been given in the application form, the selection of the distributor would stand automatically cancelled.

24) Mr. Yadav pointed out that the petitioner had in her application stated that the proposed site for the godown was owned by the petitioner's husband and the proposed site for the showroom was owned by her husband's elder brother.

25) The petitioner has enclosed a lease agreement whereby Prafulla Saha, elder brother of the petitioner's husband had agreed to allow the petitioner to use his plot of land for the show room.

26) Mr. Yadav pointed out that the petitioner had made the statement that the proposed site for the godown belonged to her husband and the proposed site for the showroom belonged to her brother-in-law on the basis of an unregistered deed of partition which was also improperly stamped. Mr. Yadav has rightly argued that there could be no valid partition without a registered deed properly stamped.

27) There does not appear to have been any deliberate attempt on the part of the petitioner to mislead the authorities, in stating that the land for the godown was owned by her husband and the land for the showroom was owned by her husband's elder brother. There being an arrangement and/or agreement between the brothers, the petitioner might have been led, through ignorance of law, to believe that the property had been divided. The petitioner did not claim that her husband was also the joint-owner of the plot for the showroom.

28) Cancellation of the selection on the ground of an error alone, might have been unduly harsh and disproportionate to the gravity of the error, more so, when the petitioner had apparently obtained the consent, of her brother in law. Given the opportunity, the petitioner have furnished appropriate documents to the satisfaction of the authorities, of her authority to use the land.

29) The fact, however, remains that even though there may not have been any intention to mislead, the incorrect assertion on the part of the petitioner might have given her an unfair advantage over others.

30) There is substance in Mr. Yadav's argument that had the correct facts relating to ownership of the land been disclosed, the petitioner might have been awarded lesser marks. Moreover a person who, whether by mistake or otherwise makes an erroneous statement renders his candidature liable to cancellation.

31) As pointed out by Mr. Yadav, as per the guidelines in the brochure, a person who owns suitable land for godown is entitled to 25 marks, a person who holds a sale agreement is entitled to 18 marks and a person who can arrange for land is entitled to 10 marks. The marks are based on information in the application. On the basis of her statement in her application, the petitioner was awarded full 25 marks.

32) Similarly, a person having clear title/registered sale deeds in respect of suitable land for shop and showroom is entitled to 10 marks, a person holding a sale agreement is entitled to 7 marks and a person who is in a position to arrange land is entitled only to 5 marks.

33) Mr. Yadav submitted that if the petitioner had disclosed that the petitioner was in a position to arrange land, the petitioner would not have been awarded full 25 marks for the godown. The petitioner would perhaps be awarded 10 marks in respect of godown instead of 25, in which case, the petitioner would have got 15 marks less. There is substance in Mr. Yadav's argument that the petitioner may have been allotted lower marks, had she disclosed the correct facts.

34) In any case, the decision not to issue letter of intent to the petitioner has not been taken only on the ground of an incorrect statement in application, but also on the ground that necessary documents in support of experience, as claimed in the application form, could neither be produced by the petitioner nor obtained from the concerned employers.

35) Mr. Yadav has drawn the attention of this Court to a corrigendum to the advertisement published in the Telegraph on 6th September, 2007 wherein it was categorically intimated that candidates would have to furnish appointment letters and/or pay slips in support of their claim to experience.

36) Mr. Yadav submitted that the petitioner did not furnish either pay slips or appointment letters. The alleged employers, for whom the petitioner allegedly worked, issued certificates. However, the registers and other records produced during field investigation did not reveal engagement of the petitioner.

37) The petitioner has subsequently in her Affidavit-in-Reply annexed two appointment letters, one of which has patently been brought into existence for the purpose of this litigation. Although the letter of appointment is claimed to have been issued in the year 1994, a mobile telephone number of Bharat Sanchar Nigam Ltd. (BSNL) is printed on the letterhead.

38) This Court can take a judicial notice of the fact that there were no mobile telephones in Murshidabad district, or for that matter anywhere in the State of West Bengal, in the year 1994. Mobile telephones were introduced in Calcutta for the first time in 1995-96.

39) Mr. Yadav submits that the mobile phone number is a number of Bharat Sanchar Nigam Limited (BSNL). BSNL introduced mobile phone service much later. Even when mobile phones were initially introduced, there were only two service providers Airtel and Command (Later Hutch and now Vodaphone). The phone numbers started with 98300 in respect of Command connections and 98310 in respect of Airtel connections.

40) Mr. Yadav's argument that the petitioner ought to have availed the Grievance Redressal Mechanism as provided in paragraph 12 of the notice for appointment of LPG Distributor is not legally sustainable.

41) A careful reading of the paragraph makes it apparently clear that the Grievance Redressal Mechanism is intended to deal with complaints relating to selection and/or in other words with complaints with regard to allocation of marks. Thus, letters of intent, if issued, are to be kept in abeyance, pending disposal of a complaint.

42) A transparent procedure has been prescribed for allocation of marks. Marks have to be allotted as per the mode provided in the Brochure on Selection of Indane Distributors. A candidate might lodge a complaint with regard to improper marking. For example, a candidate might legitimately lodge a complaint, if he is not given marks pertaining to his

educational qualifications or if he is not given any marks for experience, in spite of submission of requisite documents in support of experience. Similarly, a candidate who has clear title to land both for godown and show-room might legitimately complain if he is not allotted full marks allocated for capacity to provide land for godown and shop-cum-show room.

43) Grievance Redressal Mechanism provided in the appointment notice, does not contemplate redressal of grievances with regard to cancellation of selection. This will also be evident from the time stipulation of one month from the date of declaration of result, for making a complaint. The writ petition cannot, therefore, be rejected, just because the petitioner has not invoked the grievance redressal mechanism.

44) The principles of law, enunciated in the judgments cited by Mr. Mitra are well-established and unexceptionable. Any action that has adverse civil consequences, must be taken in compliance with principle of natural justice. There can be no doubt that an existing right, advantage or benefit cannot be curtailed without opportunity of hearing to those likely to be affected as held in H.L. Trehan (supra).

45) It is also well-settled that the rule of pre-decisional hearing is not unexceptional. In exigencies necessitating immediate action, post-decisional hearing might suffice. There can, however, be no doubt that pre-decisional hearing is more effective than post-decisional hearing. Pre-decisional hearing is the rule and post-decisional hearing the exception. Recourse may be taken to post-decisional hearing in exceptional cases of grave urgency.

46) The petitioner was, however, only selected and empanelled. An empanelled candidate has no inherent right to be appointed. No vested right of the petitioner has been affected by the impugned decision. The petitioner was thus not entitled to pre-decisional hearing.

47) Incorrect averments in an application form certainly entail the consequence of cancellation of an application. The petitioner's claim to experience was rightly disbelieved, for a certificate issued by a so-called employer, who subsequently obliged the petitioner by issuing a back-dated letter of appointment, is of no value, in the absence of supporting evidence.

48) In any case, the petitioner has approached this Court with unclean hands. Manufactured documents have been annexed to her Affidavit. This Court is thus not inclined to entertain this application. The petitioner cannot be heard to complain of denial of legitimate expectation without recourse to natural justice, when she has procured ante dated documents to strengthen her case.

49) The writ application is dismissed.

50) Urgent certified copy of this order, if applied for, be supplied to the respective parties subject to compliance with requisite formalities.

(Indira Banerjee, J.)

