

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SERVICE MATTER

WRIT PETITION (CIVIL) No.17335/05

JUDGMENT DELIVERED ON: 02.01.2007

DATE OF DECISION : 02.01.2007

SHRI S.PRABHAKAR RAO

Petitioner

Through: Mr.K.K.Rai, Advocate.

VERSUS

UNION OF INDIA and ORS.

Respondents

Through :Mr.Rajeeve Mehra and
Mr.Arjun Harkauli, Advocates for R-
1.Mr.R.Venkataramni, Sr.Adv.with
Mr.A.S.Rawat, Advocates for R-2.
Mr.Rajeev Dutta, Sr.Adv.with
Ms.Ritu Bhalla, Advocates for R-3.
Mr.Anagh Ahuja, Advocate for R-4.
Mr.A.S.Chandhioke, Sr.Adv.with
Mr.H.S.Chandhioke, Advocates for
R-5.

MANJU GOEL, J.

1. Admit.

2. The petitioner was a contender for the post of Chief Executive Officer and Managing Director (referred to as 'Post' hereinafter) of respondent no.3 M/s Petronet LNG Limited. The selection for the post was done by a Search Committee nominated by the Union of India, i.e., respondent no.1. The Search Committee selected respondent no.5 for that post. The petitioner is seeking a writ of certiorari to quash the selection process for the post as well as the appointment of respondent no.5 to the post. He also prays for a fresh

selection process without the respondent no.4 being a Member of the Selection Committee as he allegedly vitiated the process by bias.

3. Respondent no.3 is a company promoted by four public sector undertakings, namely, GAIL (India) Limited, Oil and Natural Gas Corporation, Indian Oil and Bharat Petroleum Corporation Limited. The Articles of Association of the respondent no.3 provides for a selection process for the post of the Managing Director. As per Article 109 of the Articles of Association, the Managing Director has to be selected by a Search Committee and has to be appointed by the Board of Directors. The Search Committee consists of the Chairmen of all the promoters and other persons as may be nominated by them. At the relevant time the Search Committee consisted of CMDs of BPCL, GAIL and ONGC apart from the Chairman of Indian Oil Corporation, Mr.Ashok Chandra as the Independent Chairman of the Search Committee and Mr.Arun Duggal, a Nominee of the Asian Development Bank and Mr.Jacques Deyirmendjian of GDF International. Respondent no.4 was a Member of the Search Committee in his capacity as the CMD of GAIL. In February, 2005 M/s A.F.Ferguson Associates was appointed to search and short-list the candidates for CEO and MD of the respondent no.3. An advertisement was taken out in the Times of India dated 1.6.2005 asking for applications for the post of CEO and MD. The petitioner also applied for the post. At that time the petitioner was the Director with GAIL. He submitted his application for the post of CEO and MD of the respondent no.3. The application was to be forwarded by the respondent no.4. The respondent no.4 declined to forward the application of the petitioner without assigning any reason. The petitioner again submitted a note on 11.6.2005 stating therein that the petitioner is likely to lose a good career opportunity for a higher position and that he had already submitted an advance copy of his application. Respondent no.4 took exception to the advance copy of the application being sent and did not change his mind about forwarding the application of the petitioner. A further note of the petitioner dated 29.6.2005 also did not yield any positive result in his favour. Nonetheless, it appears, the application of the petitioner was considered by M/s A.F.Ferguson Associates and his name appeared amongst the short-list of 9 candidates. On 20.7.2005 M/s A.F.Ferguson Associates issued the interview call letters to the short-listed candidates to appear for an interview before the Search Committee scheduled on 30.7.2005. The petitioner received the call letter for the interview.

4. The interview was conducted on 30.7.2005 by the Search Committee. The petitioner appeared in the interview. The Search Committee, as mentioned earlier, included the respondent no.4. The respondent no.4 had written two letters, one dated 26.7.2005 and the other dated 29.7.2005 to the CEO and MD of the respondent no.3 in respect of the candidature of the petitioner. The two letters were written after the respondent no.4 received the short-list of the candidates for the interview. In the letter dated 26.7.2005 the respondent no.4 brought to the notice of the CEO and MD of the respondent no.3 that the application of the petitioner had not been forwarded by GAIL and, therefore, his application need not be considered. The respondent no.4 further drew the attention of the CEO and MD of the respondent no.3 to the General Terms and Conditions of Appointment Rules of GAIL which required such applications to be forwarded through proper channel. The letter dated 29.7.2005 is virtually to the same effect. However, the petitioner, in the meantime, had written a letter to the Secretary (PandNG), Ministry of Petroleum and Natural Gas, Shastri Bhavan, New Delhi requesting to forward his application for the post. On 29.7.2005 Shri Swami Singh, Director, Ministry of Petroleum and Natural Gas wrote to M/s A.F.Ferguson Associates to consider the advance copy of the application sent to them by Mr.S.Prabhakar Rao for the post in question. A copy of the letter was sent to the petitioner. The petitioner on his turn submitted the same to the respondent no.4 for his information. However, as stated earlier, M/s A.F.Ferguson Associates had already considered the advance copy of the petitioner's application and had short-listed him and had even issued the call letter for interview.

5. The Search Committee held the interview on 30.7.2005. Without taking cognizance of the communications dated 26.7.2005 and 29.7.2005, the Search Committee interviewed the petitioner as well as the other candidates. The Search Committee sent its recommendations on 30.7.2005 itself. In the letter of recommendation, copy of which has been submitted by the respondent no.3, a specific mention about the two letters of 26.7.2005 and 29.7.2005 was mentioned. The letter of the Ministry of Petroleum and Natural Gas dated 29.7.2005 was also considered. The recommendation included the following paragraph: "The Search Committee considered the letters no.CMD/05/05 dated 26th July, 2005 and 29th July, 2005 of CMD, GAIL (Annexure 2) and MOPandNG letter No.L- 11014/2/05-GP dated 29th July, 2005 (Annexure 3). However, the Search Committee did not take cognizance of the communications while selecting the candidates."

6. The Search Committee recommended two names and the two names in order of merit were Mr. Prosad Dasgupta, respondent no.5 and Mr. B.S. Negi. The respondent no.3 appointed the respondent no.5-Mr. Prosad Dasgupta to the post of CEO and MD in its meeting held on 1.9.2005. The extracts from the Minutes of the Meeting have also been placed on the record by the respondent no.3 which shows that the Board of Directors was also informed of the letters of the respondent no.4 and that the Search Committee had not taken cognizance of those letters.

7. In the meantime, however, the respondent no.4 wrote a memo to the petitioner on 29.7.2005 asking for his explanation for not adhering to the rules of the company which required applications to be sent only through proper channel. The petitioner on 2.8.2005 wrote to the Secretary to the Govt. of India, Ministry of Petroleum accusing the respondent no.4 of bias and challenging the selection process on account of participation of the respondent no.4 therein. It may also be mentioned here that the petitioner, being a member of the Scheduled Caste, also approached the National Commission for Scheduled Castes, the respondent no.2, which also intervened on behalf of the petitioner.

8. The writ petition is presented on 5.9.2005, i.e. soon after the appointment of the respondent no.5. The petitioner challenges the selection process on the ground of bias. The petitioner claims that he being the Director of GAIL was not required to apply through the CEO and MD, i.e., respondent no.4. The whole case made out by the petitioner has been condensed in paragraphs 5M and 5N of the petition, which are extracted below: "5M. Unfortunately in utter disregard of rule position, the respondent No. 4 not only did not forward the application of the petitioner but also vitiated his selection process by writing to individual members and misleading them by misquoting rule position and requesting them not to consider the case of the petitioner for the said position of CEO MD of PLL. Not only that, the respondent No. 4 also participated in the selection process and canvassed against the petitioner openly for the non-selection of the petitioner on the ground that his application has not been forwarded. The true copy of the letters dated 26.07.2005 written by the respondent No. 4 to the respondent No. 3 and letter dated 29.7.2005 written by the respondent No.4 to the respondent No.3 of this nature are annexed herewith and marked as Annexures P-8 and P-9 respectively. Similar letters might have been written to other members as well. 5N. That the propriety demanded that respondent No. 4 should not have been a party to the selection committee

particularly when the petitioner was a candidate whose application was opposed by the respondent No. 4 in defiance of rules and decisions of the superior.”

9. The respondent no.2 was deleted from the memo of parties by an order dated 15.11.2006. The petitioner also made a prayer for deleting its name and no relief has been claimed against respondent no.2. The other respondents have opposed the writ petition. However, it will suffice to refer to the counter of respondent no.3 alone. The respondent no.3 has challenged the writ petition on the ground of maintainability. The respondent no.3 says that it is not an instrumentality of the State and, therefore, the petitioner cannot invoke the writ jurisdiction of this Court against the respondent no.3. The respondent no.3 has refuted the theory of bias by alleging that the Search Committee eventually did not take notice of the letters written by the respondent no.4 opposing the candidature of the petitioner. Respondent no.3 denied that the respondent no.4 had written letters to individual members of the Selection Committee and has alleged that the petitioner has made incorrect allegations in this regard. The respondent no.3 also denied that there was any open canvassing against the petitioner. Respondent no.3 further contends that the letters dated 26.7.2005 and 29.7.2005 are both written only to respondent no.3 and not to other members of the Search Committee. It is further contended by the respondent no.3 that the application of the petitioner had been processed long before those letters were written by the respondent no.4 and that the collective decision of the members of the Search Committee could not be vitiated on account of any alleged bias of respondent no.4. Further it is contended that the petitioner having appeared in the interview and having participated in the selection process without any protest or demur was not entitled to challenge the process. So far as participation of respondent no.4 is concerned, the plea of the respondent no.3 is that his presence is mandated by the Articles of Association of respondent no.3 as he is the CMD of GAIL, a promoter company. The respondent no.3 denies that the petitioner was not given a fair treatment or that the respondent no.4 openly canvassed against the petitioner. According to respondent no.3, the petitioner should have challenged the constitution of the Search Committee before he actually appeared in the interview or at least at the time of interview. The action of the petitioner raising allegations of malafides and bias is itself branded as malafide.

10. The respondent no.4 in his counter affidavit has, inter alia, alleged that he regretted to forward the application of the petitioner in the interest of GAIL since he at the relevant time he (the petitioner) was directly responsible for completion of five projects in which Rs.2600 crores had been invested and the completion schedule for these projects were between April and December, 2006. He denies having canvassed against the petitioner and to have held any bias against him or to have vitiated the selection process in any way.

11. Before proceeding further, it is essential to point out that the petitioner has made a bald assertion that the respondent no.4 not only declined to forward his application but also canvassed openly against him but has failed to render any evidence in support of the plea of open canvassing. Further the petitioner has not alleged any reason or any evidence for the respondent no.4 to be biased against him. No existing enmity of any kind is alleged. Nor is there any allegation of any previous episode from which it can be ascertained that the respondent no.4 held any malice against the petitioner. Without taking the explanation of the respondent no.4 for withholding the application into consideration, it can be safely concluded that the petitioner's case depends entirely on the respondent no.4's refusal to forward his application and also the letters dated 26.7.2005 and 29.7.2005 to the respondent no.3 intimating his refusal to forward the petitioner's application. It may be added further that the respondent no.4 did not at any point of time make any allegation against the character or antecedent of the petitioner which may have any adverse influence on his candidature. The refusal of the respondent no.4 is not alleged to have been made out of malice. The letters of 26.7.2005 and 29.7.2005 indicate the rule position and nothing more.

12. It has also to be kept in mind that the petitioner has not raised any plea against the suitability of the respondent no.5 for the post. Nor does the petitioner allege that he was more suitable than the respondent no.5 for the post. Nor is there any allegation that there was any reason other than merit to prefer the respondent no.5 over the petitioner. No extraneous consideration for selecting the respondent no.5 has been alleged.

13. From the above narration of facts it appears clear that the petitioner's case of bias itself is weak and fragile. The respondent no.4 did not give any reason for refusing to forward the application of the petitioner. All the same, the petitioner has not given any reason for doubting the bonafides of the respondent no.4 at least in the act of refusing to forward his application. The

respondent no.4 did write to the respondent no.3 but the letters in this regard refer only to the rules and not to the merit or de-merit of the petitioner. The other members of the Search Committee were also high- ranking officers and cannot be presumed to be influenced by the mere caprice of the respondent no.4, if any. It will not be wrong to imagine that the respondent no.4 would not have liked the petitioner to be selected and to leave GAIL. But that by itself does not mean that the entire Search Committee felt the same way. The Search Committee was unanimous in its decision to recommend the respondent no.5 as the most suitable candidate. They also unanimously recommended a second candidate. Mr.K.K.Rai, advocate appearing for the petitioner submitted that even a reasonable possibility of bias would be sufficient to vitiate an action and it is not necessary to prove actual bias. Reference is made by him to G.N.Nayak Vs. Goa University and Others, (2002) 2 SCC 712. In the present case this judgment cannot be applied to the petitioner's benefit. The possibility of any bias against the petitioner cannot be reasonably apprehended from the facts of the case. Bias is defined in this judgment as 'partiality' or 'preference'. It is further held that it is not every kind of bias which in law is taken to vitiate an act. It has to be a prejudice which is not founded on reasons and actuated by self-interest “ whether pecuniary or personal. The judgment further said that if a preference is rational or unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. Respondent no.4 has not shown to have any reason to be biased against the petitioner. Nor is there anything to show that the alleged bias has gone into actual selection of respondent no.5. Thus, the plea of the petitioner of the selection process being vitiated by bias is too weak to stand the test of scrutiny. Thus, on merit itself the writ petition is liable to be dismissed.

14. The respondents have launched frontal attack to the petitioner's case by pleading that the petitioner having participated in the selection process is estopped from challenging its fairness. According to the respondents, the petitioner should have challenged the constitution of the Search Committee or at least should have objected to the presence of respondent no.4 in it when it was the petitioner's turn to appear before it. It is not the case of the petitioner that he did not know the constitution of the Search Committee. Nor is it the case of the petitioner that he was surprised to find the respondent no.4 in the Search Committee. The petitioner, nonetheless, participated in the selection process. The selection process was complete on 30.7.2005 itself. It is submitted by the respondents that the petitioner now cannot be allowed to challenge such selection process. Reliance is placed on

the Supreme Court judgment in the case of Chandra Prakash Tiwari and Others Vs. Shakuntala Shuila and Others, (2002) 6 SCC 127 and to an earlier case of Dr.G.Sarana Vs. University of Lucknow and Others, (1976) 3 SCC 585. The judgment in the case of Chandra Prakash Tiwari and Others itself refers to a large number of decisions on this point. After examining the law on this point rendered by various previous judgments, the conclusion drawn by the Supreme Court is the following: “There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not “palatable” to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.”

15. The petitioner's participation in the selection process was complete when the petitioner appeared in the interview on 30.7.2005. He appeared without any demur. The recommendations were sent to the Board of Directors on the same day. The petitioner's participation, thus, does stop him from challenging the fairness of the selection process.

16. The petitioner did protest by writing a letter dated 2.8.2005. He came to the Court soon after the result was declared and the petitioner found himself not selected for the post. However, the letter written on 2.8.2005 will not save the petitioner from the estoppel applicable against him. Therefore, the writ petition challenging the fairness of the selection process does not lie.

17. One point that remains to be determined is the challenge to the maintainability of the writ petition on the ground that the respondent no.3 is not an instrumentality of the State and was not amenable to the writ jurisdiction. Court's attention is drawn to the Articles of Association of respondent no.3 to show that the State does not have pervasive control over the functioning of respondent no.3. Respondent no.3 is involved in the promotion of the business of liquid natural gas and apparently is a commercial venture. The plea of the petitioner in this regard is that the Search Committee itself has been constituted by the Government of India and, therefore, the action of the Search Committee can be subjected to judicial review under Article 226 of the Constitution of India. The attention of the Court is drawn to the letter No.L- 11013/4/97-GP(Pt) dated 24.1.2005 whereby the Search Committee of 6 members mentioned earlier was

constituted for the purpose of finding successors to Shri Suresh Mathur, CEO and MD and Shri Sham Sunder, Director (Technical) whose terms were about to expire on 31.3.2005. Even if the respondent no.3 is not an instrumentality of the State and not covered by the definition of State under Article 12 of the Constitution of India, the Search Committee cannot hope to escape judicial review of its functions. Reference is made by the petitioner to the judgment in the case of Shrilekha Vidyarthi Vs. State of U.P., (1991) 1 SCC 212. In para 26 of the judgment, the Supreme Court has emphasised that the action is reviewable if the body exercising that function is of public nature. Therefore, even if the respondent no.3 itself cannot be brought within the purview of the writ jurisdiction, the specific function of the Search Committee appointed by the Government of India cannot escape such scrutiny. In my opinion, the writ petition is maintainable.

18. However, in view of the findings in the previous paragraphs, the writ petition must fail. Same is accordingly dismissed. Pending applications, if any, also stand disposed of accordingly.

January 2, 2007

Sd./-
MANJU GOEL, J.