
(2007) 04 CAL CK 0047
In the Calcutta High Court
Case No : G.A. No. 51 of 2007

Anil Kumar Shaw

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-04-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : AIR 2007 Cal 165 : (2007) 3 CALLT 153

Hon'ble Judges : Surinder Singh Nijjar, C.J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Kalyan Bandyopadhyay, Sukumar Bhattacharya, A.J. Sengupta and Dipaniwta Saha, for the Appellant; Ajay Dutta, Ujjal Trivedi, L.C. Behani, R.A. Agarwal and Nibedita Pal, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—These two mandamus-appeals were heard together as the questions involved herein are to some extent interlinked.

2. A.P.O.T. No. 7 of 2007 is at the instance of a writ petitioner (hereinafter referred to as Anil) and is directed against order dated 19th December, 2006 passed by Patherya, J. thereby dismissed the writ application filed by Anil praying for cancellation of the Kerosene Oil Dealership Licence issued in favour of the respondent No. 6 (hereinafter called Madhusudhan). The other appeal being A.P.O.T. No. 36 of 2007 is at the behest of the State of West Bengal and other officials thereof and is preferred against the order dated November 30, 2006 passed by Maharaj Sinha, J. in G.A. No. 2923 of 2006 as well as an earlier order dated 14th July, 2006 passed by His Lordship disposing of a writ application filed by Madhusudhan thereby praying for direction upon the State Government to appoint him in the vacancy of the selfsame Kerosene Oil Dealership over which Anil also put forward his claim.

The following facts are not in dispute:

(a) One Shyamal Kumar Mukherjee, a Kerosene Dealer having surrendered his

licence, a proposal was given by the Area Inspector to tag ration cards attached to the said Dealership with two other Dealers of the locality, namely, Smt. Gita Mukherjee and Satinath Chakraborty. Subsequently, the Area Inspector gave a proposal for declaration of vacancy subject to the approval of the District authority and the Sub-Divisional Officer, Howrah, being the competent District Authority, approved the proposal of the Area Inspector and duly forwarded the same to the Sub-Divisional Controller, Food & Supply. Consequently, on September 2, 2004 a notice declaring vacancy was published by the Sub-Divisional Controller, Food & Supply.

(b) Pursuant to such declaration of vacancy, both Anil and Madhusudhan along with others applied for being considered for the said licence. On November 12, 2004, the Chief Inspector recommended Madhusudhan for the said vacancy based on his report and the Sub-Divisional Controller, Food and Supply called for the antecedent-report of Madhusudhan. On 13th April, 2005, the Sub-Divisional Officer, the competent authority authorized by the District Magistrate, approved the recommendation.

(c) On 10th May, 2005, a writ-application was filed by Anil claiming licence in his favour on the basis of the mass-petition filed by the local people demanding his appointment but the said writ-application was dismissed by J.K. Biswas. J. inter alia, holding that the villagers of the area were not entitled to interfere in the selection-process and no response should be given to the application received by the Sub Divisional Controller, Food & Supply ("SCFS") from the local people.

(d) Subsequently, on May 15, 2005, the Sub-Divisional Officer proposed departmental action against the Inspector who gave the proposal for declaration of the vacancy. Two days thereafter, on May 17, 2005, Madhusudhan made a complaint against the SCFS before the Director DDP & S alleging that SCFS demanded a bribe of Rs. 50,000/-for issue of the licence in his favour.

(e) On 20th May, 2005, Madhusudhan filed his writ-application thereby praying for direction upon the State Government to select him. During the pendency of the said writ-application, on 3rd June, 2005, a proposal for cancellation of the said vacancy was moved by SCFS and Madhusudhan made another complaint before the Deputy Secretary, Vigilance, against the SCFS alleging illegal demand of money. On June 7, 2005, the SCFS obtained the approval of cancellation of vacancy from the SDO but subject to any order that may be passed in the writ-application already filed by Madhusudhan. On June 20, 2005, an interim order was passed in the writ-application filed by Madhusudhan directing that all steps taken in the meantime would abide by the result of the writ application.

(f) On July 6, 2006 when the writ-application filed by Madhusudhan was called for hearing, none appeared for the State-respondent and the matter was adjourned till 13th July, 2006 and on 14th July, 2006 Maharaj Sinha, J. disposed of the writ-application filed by Madhusudhan with a direction for issue of licence to Madhusudhan if he was otherwise eligible.

(g) Ultimately, an application for contempt was filed by Madhusudhan before Maharaj Sinha, J. alleging that in spite of the order passed by His Lordship, the State Government did not issue an order of licence. On November 23, 2006 when the matter came up for hearing, the learned Counsel appearing on behalf of the contemnors, i.e. the officials of the State-respondents, was directed to ask his clients to implement the earlier order dated 10th November, 2006 to enable the writ-petitioner to distribute the quantity of Kerosene Oil which the petitioner received pursuant to the order dated 14th July, 2006 passed by the Court while allowing the writ-application. Madhusudhan, therefore, got Dealership licence based on the order passed by Maharaj Sinha, J.

(h) In the meantime, the State Government filed an application for recall of the order passed by Maharaj Sinha, J. disposing of the writ-application on the ground that the vacancy declared earlier was not proper and secondly, on the ground that the writ-application was disposed of on the basis of affidavit alleged to have been filed by the State-respondent which was not the real affidavit affirmed by the State.

(i) On November 30, 2006 Maharaj Sinha, J. disposed of the said application for contempt by holding that as the learned Counsel appearing on behalf of the contemnors had submitted before His Lordship that the ration-cards had already been tagged in favour of the writ-petitioner and that the writ-petitioner would receive the allocation of Kerosene Oil on regular basis, His Lordship did not wish to proceed any further in exercise of contempt jurisdiction against the contemnors. In the next paragraph of the order, His Lordship recorded that in view of the above orders, the application filed by the State Government being G.A. No. 2943 of 2006 was also disposed of. His Lordship assigned no reason on the merit of the G.A. No. 2943 of 2006.

(J) Being dissatisfied with the original order dated July 14, 2006 disposing of the writ-application and also the subsequent order dated November 30, 2006 passed by Maharaj Sinha, J. disposing of the application for reconsideration of the order dated July 14, 2006, the State has come up with one of the present mandamus-appeals being A.P.O.T. No. 36 of 2007.

(k) On the other hand. Anil filed a separate writ-application being W.P. No. 1930 of 2006 alleging that the licence granted in favour of Madhusudhan was illegal as there was no finding recorded by the State-respondent that Madhusudhan was otherwise eligible to obtain licence in accordance with the order passed by Maharaj Sinha, J.

(l) According to Anil, the State Government granted licence in favour of Madhusudhan in view of pendency of the application for contempt and thus a direction should be given to the State Government to reconsider the respective claims of Anil as well as Madhusudhan on the question of filling up of the vacancy.

(m) Patherya, J. by order dated 19th December, 2006 dismissed the said writ-application on the ground that in view of the earlier decision passed by Maharaj

Sinha, J. there was no scope of passing any further direction on the writ-application filed by Anil,

(n) Being dissatisfied with the order dated December 19, 2006 passed by Patherya, J. Anil has filed the other mandamus-appeal being A.P.O.T. No. 7 of 2007 before us.

3. As indicated earlier, both the previously mentioned appeals were heard together and for the purpose of disposal of the appeals, we directed the learned advocate for the State to produce before us the original records relating to the vacancy in question. Accordingly, the original records were placed before us, On March 9, 2007, when the hearing of the appeals was concluded and we were about to deliver the Judgment, Mr. Behani, the learned senior advocate appearing on behalf of Madhusudhan submitted before us that he was not prepared for hearing of the appeal but was under the impression that the stay application in connection with the appeal would be heard. In view of such submission, we had adjourned the matters for a week to enable Mr. Behani to prepare himself for hearing of the appeals after giving him opportunity of inspecting the original records produced by the respondents.

4. Ultimately, we heard the matters on March 23. 2007.

5. We have decided to take up the appeal being A.P.O.T. No. 36 of 2007 filed by the State at the first instance.

6. After hearing the learned Counsel for the parties and after going through the materials on record, we find that after the surrender of the licence by the previous Dealer, initially a declaration of vacancy was made and pursuant to the advertisement of vacancy, both Anil and Madhusudhan along with others applied for being considered for the vacant dealership. Subsequently, during the pendency of the writ-application filed by Madhusudhan, a proposal for withdrawal of the declaration of vacancy earlier made was given and was sent to the Sub-Divisional Officer for approval. The Sub-Divisional Officer on June 7, 2005 accorded approval to such proposal subject to the decision in the pending writ-application. In the pending writ-application, on the other hand, an interim order was passed on June 20, 2005 to the effect that any order passed by the respondents in the meantime will abide by the result of the writ-application,

7. It appears from the order dated July 14. 2006 passed by Sinha. J. that His Lordship took note of the fact that on May 31, 2005 the proposal for the cancellation of the vacancy was given but the same could not be given effect to because of the pendency of the writ-application. There is no dispute that the according to the policy adopted by the State Government vide order No. 4546-F.S dated October 23, 2000 issued by the Principal Secretary, Department of Food and Supply, Government of West Bengal, there should not be any declaration of vacancy unless total number of ration-cards between 3500 and 4000 can be tagged with that particular dealer. In the case before us, undisputedly, much less number of ration-cards will be tagged to the dealership

in question and in fact, pursuant to the order passed by Sinha, J. Madhusudhan is dealing with lesser number of ration-card-holders than the norms fixed by the State Government. At this stage, we may profitably refer to the fact that the previous dealer, viz. Sri Shyamal Kumar Mukherjee, having been tagged with 1131 ration-cards, was compelled to surrender the licence as he was unable to maintain even the establishment-cost with such small number of ration-cards and in such circumstances, the previous decision to declare a vacancy was definitely improper and such illegality having been detected, the State Government decided to recall the vacancy.

8. We, therefore, find that while allowing the writ-application filed by Madhusudhan, learned single Judge erred in not considering whether there was any scope of creation of a vacancy according to the existing policy-decision taken by the State Government. It is apparent from the facts of the present case that having regard to the existing decision of the State Government, no new vacancy could have been declared. In spite of taking a decision for the cancellation of the vacancy earlier improperly declared, the State Government could not implement such decision because of the pendency of the writ application filed by Madhusudhan.

9. It is now settled law that in order to invoke the writ jurisdiction under Article 226 of the Constitution of India, a writ-petitioner must prove the existence of a legal or fundamental right in his favour and that such a legal or fundamental right has been infringed by the action or inaction on the part of a "State" within the meaning of Article 12 of the Constitution of India. In the case before us, Madhusudhan having failed to establish that the first and foremost condition fixed by the State Government for creation of a vacancy of Kerosene Dealership has been fulfilled, the writ-application had to be rejected on that ground alone. We are also of the opinion that the review petition filed by the State deserved to be considered on merit. If a litigant complies with the order of a Court in the absence of an order of stay and particularly, in view of the Rule of Contempt already issued, such fact does not take away his right to pray for review of the order or to challenge the said order before the appellate forum in accordance with law.

10. Therefore, the learned single Judge ought to have disposed of the application for reconsideration of the order dated July 14, 2006 filed by the State on merit notwithstanding the fact that the State had complied with the said order in view of the pending application of contempt.

11. We, therefore, find that in the facts of the present case there is no scope of appointing any new Kerosene Dealer having regard to insufficient number of ration-cards of that area. The application filed by Madhusudhan has to be rejected only on the ground that as the State Government had rightly decided to recall the vacancy earlier declared, no direction could be issued upon the Government to appoint the writ-petitioner in the purported vacancy which had since been recalled. In the pending writ-application, the Court had already

passed an order that any decision passed therein would abide by the result of the final decision. Therefore, at the time of passing final decision on the writ-application, the learned single Judge had to decide whether the decision to revoke the declared vacancy, earlier made, was correct or not. This very important fact seems to have escaped the notice of the learned single Judge.

12. We are not at all impressed by the submission of the learned advocate for Madhusudhan that as there are instances where existing dealerships tagged with less than 3500 ratio-cards are continuing, we should ignore the decision of the State Government mentioned above and permit his client to carry on with the lesser number of ration-cards attached. Merely because there are some dealers who are continuing in violation of the decision of the State Government cannot create any right in favour of the writ-petitioner. This Court cannot pass a direction upon the State Government to pass further illegal order deviating from their own decision based on public policy. In this connection, it will be appropriate to refer to the following observations of the Supreme Court in the case of *Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore Vs. President, Indore Development Authority*, :

A party cannot claim that since something wrong has been done in another case direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the appellant cannot strengthen its case. It has to establish strength of its case on some other basis and not by claiming negative equality. (See *Union of India (UOI) and Another Vs. International Trading Co. and Another*, .

13. We, therefore, set aside the order dated July 14, 2006 passed by Maharaj Sinha, J. in the writ-application filed by Madhusudhan and accordingly, dismiss the same.

14. In view of our order mentioned above, there is no scope of considering the prayer of Anil made in the writ-application filed by him, as the decision of the State Government to cancel the vacancy, earlier improperly declared, does not suffer from any illegality.

15. We, therefore, allow the appeal filed by the State being A.P.O.T. No. 36 of 2007. The other appeal being A.P.O.T. No. 7 of 2007 filed by Anil is, accordingly, dismissed by rejecting the writ-application filed by Anil on the aforesaid ground alone. Madhusudhan is directed to immediately surrender the dealership to the State Government with the unutilised amount of Kerosene Oil given to him pursuant to the licence.

16. In the facts and circumstances, there will be, however, no order as to costs.

17. Let the original records submitted by the learned advocate for the State be returned.

Surinder Singh Nijjar, C.J.

18. I agree.