

(2020) 06 CAL CK 0085

In the Calcutta High Court

Case No : Tender Of Mand Appl (MAT) No.1019 Of 2018

Bakul Rani Patra

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 24-06-2020

Acts Referred:

Essential Commodities Act, 1955 — Section 3
Consumer Protection Act, 1986 — Section 13(2)(a)
West Bengal Primary Teachers' Recruitment Rules, 2001 — Rule 14
Constitution Of India, 1950 — Article 14

Citation : (2020) 06 CAL CK 0085

Hon'ble Judges : I. P. Mukerji, J; Protik Prakash Banerjee, J

Bench : Division Bench

Advocate : Kalyan Kumar Bandyopadhyay, Ramanand Agarwal, Nibedita Pal.
Ramesh Dhara, A.G. Mukherjee, Amitesh Banerjee, Tarak Karan

Final Decision : Allowed

Judgement

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I. P. Mukerji, J

This judgment was made ready before the imposition of lockdown by the government on account of the COVID pandemic. It is now being delivered

after proper availability of technical infrastructure to deliver the same.

MR dealership granted by the state government is not a heritable right. When an MR dealer dies, a vacancy in the distribution network arises. In the

usual course it is filled up by a selection process. However, the legal heir of the deceased distributor is given an option to apply to the government for

grant of dealership, in his or her favour, on compassionate ground within or without a specified time limit. The case for compensation is made out if the

family is in financial hardship. When such an application is made and the other conditions in the scheme for the grant of dealership in such a

contingency are fulfilled, then the government has a discretion to grant the dealership in favour of the legal heir.

In this case, the legal heir is the mother of the deceased dealer, Sabyasachi Patra. She filed such an application. However, this application was

delayed by a few months. On this ground alone her application was not considered by the government.

In the instant writ application [WP 14866(W) of 2018] the learned single judge by his impugned judgment and order dated 16th August, 2018 dismissed

the writ application of the widow on the ground that the time limit of sixty days from the death of the MR dealer specified in the scheme could not be

extended on any ground and that the respondent authority was justified in rejecting the delayed application of the appellant/writ petitioner.

Now, I shall come to the facts in more detail.

The government of West Bengal issued the Kerosene Control Order in 1968. It provided for issuance of a licence for MR dealership. It is issued by

the Sub-Divisional Controller, Food and Supplies of the district. In this case, the licence was issued by the Sub-Divisional Controller, Bankura. It was

in favour of the husband of the appellant, appointing him as an MR and Kerosene dealer.

The subordinate legislation involved is the West Bengal Public Distribution System (Maintenance and Control) Order, 2013. It was made in the

exercise of the power conferred on the state government by Section 3 of the Essential Commodities Act, 1955 read with a notification dated 31st

August, 2001 issued by the Central government. Paragraph 20 of this order provides for appointment of a family member of a deceased dealer on

compassionate ground. The criterion to be satisfied is that for shortage of financial resources the family on the death of the dealer cannot survive. This

application had to be made within 60 days of death.

During the lifetime of the appellant's husband, at his request this dealership was transferred to his elder son, Sabyasachi Patra. The appellant has

averred in the writ petition that her son, Sabyasachi ran the dealership properly obtaining a licence under the West Bengal Public Distribution System

(Maintenance and Control) Order, 2013 read with the West Bengal Kerosene

Control Order, 1968.

The appellant was visited by misfortune. She lost her husband on 21st December, 2008 and her son, Sabyasachi on 6th January, 2016.

She stated in the writ petition that she was greatly disturbed mentally on the death of her son. She was living separately from the rest of the family.

After partially recovering from her grief, she had no option but to stake her claim for the dealership on compassionate ground to meet the expenses of

living. She says that on or about 9th June, 2016 she decided to make the application for transfer of the dealership in her favour. On the same day she

filled up the TR Form No. 7, which was the applicable form, got it countersigned by the Sub-Divisional Controller, Bankura and deposited the

application fee of Rs.1,000/-. It is also said that the application with the requisite documents could only be filed with the authority on 27th September,

2016.

Further, the widow of the deceased son did not object to the grant of the said licence in her favour.

After more than one year on 31st July, 2017 the said Sub-Divisional Controller rejected the appellant's application on the ground of delay.

This was the appellant's cause of action in filing the writ application. She prayed for cancellation of this order dated 31st July, 2017 of the Sub-

Divisional Controller. A prayer was also made for a direction upon the respondent authority to issue the dealership licence in her favour.

On 16th August, 2018 the writ application was dismissed by a learned single judge of this court. His lordship held that the Control Order contained a

specific provision for making an application for appointment of a dealer on compassionate ground. There was a time limit of 60 days from the death of

the holder of the licence to make this application. As the application of the appellant was beyond time it was rightly dismissed by the Sub-Divisional

Controller.

Hence, this appeal.

A very short, but important point is involved in this appeal. It was argued at some length. Legal principles of some interest were argued by learned

counsel on both sides.

Admittedly the application by the mother of the deceased dealer was made a few months beyond 60 days. On 9th June, 2016 the TR-7 challan along

with the fee was deposited. The application was made on 27th September, 2016. The Sub-Divisional Controller called the appellants for a hearing on

25th April, 2017 through a notice dated 17th April, 2017. On 31st July, 2017 the appellant's application was rejected, on the sole ground of delay.

Did the officer have the power to condone the delay and consider the application on merits?

According to Mr. Kalyan Kumar Bandyopadhyay, learned senior advocate for the appellant, the officer had the power to condone the delay. Mr.

Amitesh Banerjee, learned Senior Standing Counsel for the respondent said that this time limit was not extendable.

The right of a family member of a deceased employee to seek employment on compassionate ground has to be balanced against the rights enjoyed by

all citizens to claim equality of opportunity in public employment under Article 16 of the Constitution. The Supreme Court in V. Sivamurthy Vs. State

of Andhra Pradesh & Ors. reported in (2008) 13 SCC 730 elucidated this principle observing that the right to obtain compassionate appointment was

an exception to the principle of equality in public employment, in cases where the family members of a deceased employee were in very involved

financial condition and needed immediate finance.

In Teri Oat Estates (P) Ltd Vs. U.T., Chandigarh and Ors. reported in (2004) 2 SCC 130 the Supreme Court cautioned us that where the appellant

could not establish a legal right compassionate appointment could not be granted on sympathy. In Bhawani Prasad Sonkar Vs. Union of India & Ors.

reported in (2011) 4 SCC 209, the family members of a totally incapacitated employee of the railways were considered for appointment on

compassionate ground. The appellant in that court was the son of a medically unfit employee not totally incapacitated. His appeal for compassionate

appointment was turned down by the railways. In that context the Supreme Court ruled:-

20. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) A Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is

to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate

appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the

bread winner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the

financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or

daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.â??

In Piali Saha Vs. State of West Bengal reported in (2013) 1 CHN (CAL) 18, before a special bench judgment of our court, rule 14 of the West

Bengal Primary Teachersâ?? Recruitment Rules, 2001 relating to compassionate appointment was under consideration. According to the rule, the

application for consideration had to be made within two years from the death of the employee. This bench was of the view that when a Rule created

â??some substantive right to be exercised within a time frameâ?? the court could not extend this time.

In LIC Vs. Asha Ramchandra Ambekar reported in (1994) 2 SCC 718, the Supreme Court opined as follows:-

â??10. Of late, this Court is coming across many cases in which appointment on compassionate ground is directed by judicial authorities. Hence, we

would like to lay down the law in this regard. The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic

consideration. No doubt Shakespeare said in â??Merchant of Veniceâ??:

The quality of mercy is not strained; It dropped, as the gentle rain from heaven Upon the place beneath it is twice blessed; It blessed him that gives,

and him that takes;

These words will not apply to all situations. Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the

embodiment of all Wisdom". Justice according to law is a principle as old as the hills. The courts are to administer law as they find it, however,

inconvenient it may be.â??

On the basis of this Mr. Amitesh Banerjee for the state submitted that even a dayâ??s delay in submitting an application could not be condoned.

In the case at hand the application had to be made within 60 days of death. Having not been so made the authorities had no power to extend the time and the same was rightly rejected.

Mr. Kalyan Kumar Bandopadhyay, learned counsel for the appellant made a most interesting comparison between the West Bengal Public

Distribution System (Maintenance and Control) Order, 2013 and the West Bengal Urban Public Distribution System (Maintenance and Control) Order,

2013. In the first Control Order the application for compassionate appointment had to be made within 60 days of death whereas in the second, no time

period was specified. Both these control orders were made under Section 3 of the Essential Commodities Act, 1955 read with the Central

governmentâ??s notification dated 31st August, 2001. He argued that the intention of the maker of the two pieces of subordinate legislation should be

inferred from their comparison. Both the Control Orders dealt with the same subject matter but in respect of different areas. The intention of the

administration while publishing the Control Orders could not be that for one area there would be a time limit to make the application whereas for

another area there was none. Therefore, the stipulation of 60 days had to be taken as directory. Learned counsel cited authorities where it was

elucidated as to when a provision in the statute was to be taken as mandatory or directory. He cited the Supreme Court decision in the case of State

of Mysore & Ors. Vs. Narasimha Ram Naik reported in AIR 1975 SC 219 0which laid down that whether a provision was mandatory or directory

had to be gathered not only from the wording of the provision but also from the intention of the legislature including the consequences that would

follow from the breach of the provision.

In Teri Oat Estates (P) Ltd vs U.T., Chandigarh and Ors. reported in (2004) 2 SCC 130 the Supreme Court opined that where there was absence of a

legal right, an order in favour of an applicant could not be passed out of sympathy or sentiment.

In Surendra Trading Company Vs. Juggilal Kamlatpat Jute Mills Company Ltd. & Ors. reported in (2017) 16 SCC 14 3certain provisions of the

Insolvency and Bankruptcy Code were under consideration by the highest court. In Section 9(5) of the said Code the adjudicating authority was required to pass certain orders within 14 days of receipt of an application. If there was a procedural defect in it, 7 days' time was given to the applicant to cure it. If such defect was not cured within 7 days the application was to be rejected. The tribunal held that the first time stipulation to be directory but the second time stipulation regarding rectification of defects was mandatory. The Supreme Court held both the provisions to be directory in spite of employment of the word 'shall'. In *Topline Shoes Ltd. Vs. Corporation Bank* reported in (2002) 6 SCC 33 once again the court had to make a similar interpretation as to whether the time limit prescribed in Section 13(2)(a) of the Consumer Protection Act, 1986 was to be taken as mandatory or directory. The Supreme Court held that the provision in the Act for filing the objection or response to the complaint was directory. Even if the filing was beyond 30 days and the further period of 15 days allowed to rectify the time to file the response, in the absence of a penal provision in the statute, the mandate was to be presumed as directory. The *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472 has laid down the same ratio.

Mr. Justice Mathew remarked in *State of Mysore & Ors. Vs. V. K. Kangan & Ors.* reported in AIR 1975 SC 2190:-

'10. In determining the question whether a provision is mandatory or directory, one must look into the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. We see no reason why the rule should receive a permissible interpretation instead of a pre-emptory construction. As we said, the rule was enacted for the purpose of enabling the Deputy Commissioner (Land

Acquisition Collector) to have all the relevant materials before him for coming to a conclusion to be incorporated in the report to be sent to the

Government in order to enable the Government to make the proper decision. In *Lonappan v. Sub-Collector of Palghat*(1) the Kerala High Court took

the view that the requirement of the rule regarding the giving of notice to the department concerned was mandatory. The view of the Madras High

Court in *K. V. Krishna Iyer v. The State of Madras*(2) is also much the same.â??

In *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472 the Supreme Court following its ruling in *Sna lem Advocate*

Bar Association vs. Union of India reported in (2005) 6 SCC 344 said that use of the word â??shallâ? was ordinarily indicative of the mandatory

nature of the provision but in the context in which the word was used or on a consideration of the intention of the legislation it could be termed as

directory. The other decisions cited by Mr. Bandyopadhyay, namely, *Malwa Strips Pvt. Ltd. Vs. Jyoti Ltd.* reported in (2009) 2 SCC 426, *urendra*

Trading Company Vs. Juggilal Kamlatpat Jute Mills Company Ltd. & Ors. reported in (2017) 16 SCC 143, *Topline Shoes Ltd. Vs. Corporation Bank*

reported in (2002) 6 SCC 33 made an interpretation of the provisions using the word â??shallâ? to mean directory, in the context of a particular part

of an act or upon ascertainment of the intention of the legislature.

The appellant has tried to establish a very positive case that on the death of her son on 6th January, 2016, she became ill as result of shock. Intense

grief suffered by the appellant on the death of her son is quite natural. We believe this statement made by her. We also accept that because of this

intense grief she could not file the application for appointment as a dealer on compassionate ground within the stipulated time of 60 days from death. It

took her five monthsâ?? time to recover partially from this stage. On or about 9th June, 2016 the TR form No.7 was filled up by her, thereafter

signed by the Sub-Divisional Controller and deposited by her on the same day. On 27th September, 2016 she submitted this form.

To my mind, the intention of the legislature is most important. This intention may not be evident from the express words of the Control Order. But the

intention as sought to be identified by Mr. Bandyopadhyay on comparison of the two Control Orders of 2013 is most important. In the first Control

Order extending to a geographical area the time limit is 60 days from death

whereas in the other Control Order extending to another geographical area there is no time stipulation. Both these Control Orders were issued by the state government. It is to be presumed that the government did not intend to discriminate between an applicant for compassionate appointment for dealership, based on any region or area in which the dealership was situated.

It is a settled principle of law that a scheme for compassionate appointment has to be applied strictly. To avail of the benefit of the scheme an applicant has to satisfy its requirements. There is no scope of any extra sympathy or compassion than what is provided in the scheme. But every stipulation in the scheme is subject to interpretation. In this case, the scheme is contained in the Control Order which is a piece of delegated legislation.

The provision regarding the time limit within which an application for compassionate appointment can be received by the government is also subject to interpretation.

The interpretation required in this case is whether the application of the appellant filed on 27th September, 2016 more than 8 months after the death of her son could be received? On consideration of two Control Orders, the intention of the legislature seems to be plain that the time limit of 60 days was for the purpose of preventing undue delay in the presentation of claims or in other words the purpose was to invite claim as expeditiously as possible.

This is so because a vacancy in the dealership arises immediately on the death of a dealer. If the dealer's family is in financial distress he has a right to obtain the dealership. Otherwise it is offered to the public. It is the responsibility of the government to allot the dealership through a selection process, after the death of a dealer. Before doing so the right of the family of the deceased to avail of the compassionate appointment scheme has to be availed of and dealt with as expeditiously as possible. In my opinion, that is why, the time limit, on a purposive and fair interpretation of the Control Order. In appropriate cases the government retains the right to extend the time limit.

In this case, the applicant is the widow of the original dealer and mother of the last holder of the dealership licence. The intense grief which the appellant suffered, was a valid excuse, for not having made the application in time. I do not think eight months' delay in making the application was at all an uncondonable delay. Moreover, the respondents have not till date

started a selection process for this dealership.

In those circumstances, it was not proper on the part of the respondents to have rejected the application of the appellant on the ground of delay. The

learned judge has also made an error of judgment in treating the time limit of 60 days for making the application as mandatory and any delay

unconardonable.

For the reasons given above, I set aside the judgment and order dated 16th August, 2018.

The respondent authority is directed to consider the application for grant of dealership of compassionate ground made by the appellant strictly

according to the observations made by us and come to a decision within eight weeks of communication of this order. The appeal (MAT 1019 of 2018)

is allowed.

The connected application (CAN 6965 of 2018) is disposed of by this judgment and order.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I have had the opportunity of reading the comprehensive and luminous judgment of my Learned Brother and am richer in mind and knowledge of law

for it. While I whole heartedly agree with the reasoning of His Lordship, my Learned Brother and the ultimate result of the appeal as recorded by His

Lordship, my Learned Brother, I offer a more pedestrian and commonplace mode of approaching the case.

It is common ground that unless the TR 7 form is supplied and filed, there is no application in the eye of law, under the Control Order in question. It is

also a matter of record that the petitioner says that on or about 9th June, 2016 she decided to make the application for transfer of the dealership in her

favour; on the same day she filled up the TR Form No. 7, which was the applicable form, got it countersigned by the Sub-Divisional Controller,

Bankura and deposited the application fee of Rs.1,000/-. This was in respect of the dealership then standing in the name of Sabysachi Patra, who had

died on January 6, 2016.

Needless to mention, for the death of Sabyasachi Patra, the period of 60 days would expire, on the most charitable of calculations, on March 6, 2016.

Therefore, had the time-period of 60 days been mandatory, the authorities would have had no business in issuing the TR Form No.7 to the petitioner

for making her application, at the very least more than 6 months and 3 days after the date of death and at least 4 months and 3 days after the expiry of

the period of 60 days from the date of death, for making the application. Yet the authorities inexplicably not only issued such form, but accepted the

application fee of Rs.1000/- on June 9, 2016, long after the date of expiry of the said period of 60 days. Whether a formal application with documents

was made thereafter on September 27, 2016 or not, assumes secondary importance.

This is because, if a period mentioned in a provision having statutory flavour, is mandatory, then whether there is a delay of one day in complying with

is requisition, or one year, the effect would be the same. The filing would be non est and no effect can be given to it. Yet here, not only did the

authority issue to the petitioner the said TR Form No.7 at least four months and three days after the expiry of the last date, the authorities accepted

the requisite fees and did not refund it! Very curiously, there is no allegation by the authorities that this was a mistake. Therefore, this admitted

position on facts, continues to haunt the contentions of the respondents. Thus, even though there cannot be any estoppel against statute or that which

has the effect of one, I may take it that an estoppel is operating against the respondents from disputing that the time period of 60 days is directory and

not mandatory. If sufficient cause is shown, the authority would always have the liberty to condone the delay â?" as was done in this case for the

widow who was mentally shocked at her sonâ??s death â?" of a few months.

If truly the period was mandatory, what prevented the authorities from refusing to issue the TR Form No.7 or made it accept the application fees on

June 9, 2016 or made it accept the formal application with documents on September 27, 2016? What prevented the authority concerned from forthwith

rejecting the application with a two-line order that the application having been made beyond 60 days from the date of the death of the dealer, it could

neither be accepted nor allowed? Instead, the authority waited almost one year before rejecting the application. These are questions which I not only

asked myself in the process of deciding the appeal, but also asked the learned counsel for the respondent authorities. The only answer I received was

the sound of silence.

A modified ration dealership does not belong to *res extra commercium*. It is not merely a liberty granted to a citizen. It is a means of earning a

livelihood given to him, but under strict conditions which amount to regulations. These regulations are in the public interest since they regulate the sale

and distribution of necessities to the people at large. Therefore, the same partakes of the same welfare nature of activity which the State is supposed

to perform in other spheres. While performing a welfare function, I completely agree with His Lordship my Learned Brother, the State cannot

maintain double standards, of having a mandatory time limit in case of one Control Order of 2013, and none at all in case of another Urban Control

Order of 2013, operating in the same field but in a different geographical area. Normally, whenever a statute prescribes that a particular act is to be

done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to

hold that the requirement is not mandatory and the specified consequence should not follow, as was held in the case of *Sharif-ud-din* v *Abdul*

Gani Lone reported in AIR 1980 SC 303. Where however, the executive gives a certain period within which a specified act is to be performed, but

extends such time expressly or by necessary implication (the latter is the case here) the original period cannot be enforced with the same rigour, since

the rigour has already been relaxed. That is why the 2013 Urban Control Order has assumed importance" once it is appreciated that there is no

time limit in such control order, for certain areas, demanding that there be a mandatory time limit for applying for compassionate appointment in other

areas, becomes an exercise by which the State denies citizens equal treatment before the law and equal protection of the laws. That would of course

be in violation of Article 14 of the Constitution of India, and if we were to hold that the time limit in one case is mandatory and in the other case there

is no time limit, then we would also have to hold that the said mandatory provision is *ultra vires* Article 14 of the Constitution of India. Because of this

alone, the interpretation proposed by His Lordship, my Learned Brother, harmonizes the discordant notes sounded by a bureaucracy too busy

generating control orders to assess their impact inter se and that is why I also hold that the time limit of 60 days in the Control Order of 2013 is

directory and not mandatory and the delay in making an application for compassionate appointment can be condoned if sufficient grounds are made out.

Consequently, I would hold that the judgment dated August 16, 2018 passed by the Learned Single Judge, which does not consider this aspect of the

matter, cannot be sustained and the same is therefore set aside. As a result, MAT 1019 of 2018 is allowed and the respondent authority is directed to

consider the application for grant of dealership of compassionate ground made by the appellant strictly according to the observations made by us and

come to a decision within eight weeks of communication of this order.