

(2016) 02 CAL CK 0048

In the Calcutta High Court

Case No : W.P. Nos. 21333 (W) and 17744 (W) of 2015

Barun Ghosh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Citation : (2016) 02 CAL CK 0048

Hon'ble Judges : Tapabrata Chakraborty, J.

Bench : Single Bench

Advocate : Bikash Ranjan Bhattacharyya, Biswanath Chakraborti and Krishnendu Bera, for the Appellant; Sushovan Sengupta and Subir Pal, for the Respondent

Final Decision : Disposed off

Judgement

Tapabrata Chakraborty, J.—1. The writ application being W.P. No. 21333 (W) of 2015 has been preferred challenging, inter alia, an order dated 31st January, 2014 passed by the O.S.D. & Ex-Officio Special Secretary, Government of West Bengal, Department of Food and Supplies and the writ application being W.P. No. 17744 (W) of 2015 has been preferred challenging, inter alia, an order dated 13th July, 2015 issued by the District Controller (F & S), South 24 Parganas (hereinafter referred to as DC). As common issues are involved in the said writ applications, the same are taken up for hearing together.

Shorn of unnecessary details the facts are that in compliance of a judgment dated 27th July, 2007 passed by the Hon'ble Appeal Court in FMA No. 271 of 2005, a notification inviting applications for filling up a vacancy of Modified Rationing Distributorship at Jamtalahat, Kultali Police Station (hereinafter referred to as the said vacancy) was issued on 31st December, 2009. The said notification was challenged in W.P. No. 144 (W) of 2010 by the Kultali Food Marketing Company Limited (hereinafter referred to as KFMC) and the same upon contested hearing was disposed of by an order passed on 5th May, 2010 restraining the respondents from filling up the said vacancy without issuing

public notification. The said order dated 5th May, 2010 was challenged by the petitioner in appeal which was dismissed on 1st September, 2011. Thereafter in terms of the order dated 5th May, 2010, a notification was issued inviting applications for filling up the said vacancy and pursuant thereto nine persons applied including the petitioner and the KFMC. Responding to a complaint lodged by the petitioner, the DC upon enquiry, passed an order on 8th February, 2012 observing, inter alia, that the godown of KFMC is not in Jamtalahat. The said order dated 8th February, 2012 was challenged by KFMC through a writ application being W.P. 132 of 2012 and the same was disposed of by an order dated 14th August, 2013 quashing the order dated 8th February, 2012 and directing the DC to consider the report of the Sub-divisional Controller (Food and Supplies) (hereinafter referred to as SDC) and to send his recommendations with a further direction upon the Director to decide the matter afresh. In terms of the directions contained in the order dated 14th August, 2013 the Director passed an order dated 11th November, 2013 agreeing with the views of the DC and recommending the candidature of the petitioner for engagement as distributor in the said vacancy. Thereafter, the OSD and Ex - Officio Special Secretary issued an order on 31st January, 2014 cancelling the said vacancy and directing the SDC to initiate a fresh proposal in terms of the West Bengal Public Distribution System (M & C) Order, 2013 (hereinafter referred to as the said Control Order of 2013). Challenging the said order dated 31st January, 2014 KFMC preferred a writ application being W.P.10608 (W) of 2014 and aggrieved by the order passed in the same, the petitioner preferred an appeal being MAT 1150 of 2014 and the same was dismissed on 16th July, 2014 observing, inter alia, that the dismissal of the appeal will not prevent the appellant from challenging the subsequent steps and or decision of the respondent authorities for filling up the said vacancy at Jamtalahat by filing appropriate application in connection with the pending writ petition. Thereafter an order was passed on 13th July, 2015 by the DC inviting applications for a vacancy of distributorship "at near the office of BDO under Kultali block".

2. Mr. Bhattacharyya, learned senior advocate appearing for the petitioner submits that pertaining to the said vacancy at Jamtalahat there had been a series of litigation and ultimately in terms of the order dated 14th August, 2013 passed in W.P. No. 132 of 2012, the Director passed an order on 11th November, 2013 but without considering the same the Special Secretary abruptly issued the impugned memorandum dated 31st January, 2014 cancelling the said vacancy.

3. According to Mr. Bhattacharyya, a legal right accrued in favour of the petitioner to be considered for appointment against the said vacancy under the provisions of the West Bengal Public Distribution System Order, 2003 (hereinafter referred to as the said Control Order of 2003) in terms of the order dated 14th August, 2013 passed in W.P. No. 132 of 2012 and the memorandum dated 11th November, 2013 and that such right has been sought to be illegally interfered with by the impugned orders dated 31st January, 2014 and 13th July, 2015.

4. He further submits that the Director by order dated 11th November, 2013 agreed with the view of DC and recommended the candidature of the petitioner for engagement as distributor in the said vacancy and that the said order, having not been challenged by KFMC, has attained finality. After the petitioner's claim has been forwarded to the government by the Director, the government is only required to arrange or empower any officer for issue of appointment letter together with licence in prescribed form. In support of such contention, attention of this Court has been drawn to the provisions of Clause 23 of the said Control Order of 2003.

5. According to him, the State respondents did proceed to comply with the order dated 14th August, 2013 but after issuance of the order of the Director on 11th November, 2013, the matter was kept pending without any reason and abruptly on 31st January, 2014 the order of cancellation was issued. The said order being contrary to the directives contained in the order of this Court dated 14th August, 2013, is not sustainable in law. The sustainability of the order dated 11th November, 2013 ought to have been determined by the Director in terms of the provisions of Clause 23 of the said Control Order of 2003 and prior thereto the issuance of the order of cancellation of the said vacancy renders the directions contained in the order of this Court dated 14th August, 2013 to be infructuous.

Drawing the attention of this Court to the provisions of clause 23(ii) of the said Control Order of 2003, Mr. Bandopadhyay submits that mere recommendation of an authority does not create any right towards appointment as distributor. Finality as regards appointment of distributor is attained when government approves the order of the Director. Admittedly, no such approval was granted and that as such no legal right accrued in favour of the petitioner to challenge the order of cancellation of vacancy and the vacancy notice. Furthermore, no legal right has accrued in favour of the petitioner on the basis of the memorandum dated 11th November, 2013 and that the petitioner has not suffered any civil/evil consequences and he was free to apply for appointment as M/R distributor in response to the vacancy notice dated 13th July, 2015. The position of the petitioner herein is similar to that of a candidate, who participates in a selection process and is empanelled. Mere inclusion of the name of such candidate in the panel does not create any right in his favour against the unfilled post. In support of such contention reliance has been placed upon the following judgments :

"(a) P. Suseela and Others v. University Grants Commission and Others, reported in , (2015) 8 SCC 129 (Para 24);

(b) M/S. Sethi Auto Service Station & Anr. v. Delhi Development Authority & Ors., reported in Judgment Today , 2008 (11) SC 520 (Paras 7 to 12);

(c) Manoj Manu and Another v. Union of India and Others, reported in , (2013) 12 SCC 171 (paras 10 & 12);

(d) Raj Rishi Mehra and Others v. State of Punjab and Another, reported in , (2013) 12 SCC 243 (para 15)."

He further submits that the Control Order of 2013 was notified on 8th August, 2013 and that admittedly prior thereto the vacancy at Jamtalahat was not filled up and that as such there had been no error on the part of the State respondents in applying the provisions of the new Control Order of 2013 and the government rightly decided to cancel the said vacancy in view of the material changes which had occasioned in the public distribution system. Such decision of a government is a policy decision and the same does not suffer from any patent illegality or from the vice of malafide warranting interference of this Court in exercise of the power of judicial review. A policy decision is not required to be supported with any detailed reasoning. While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy. In support of such contention reliance has been placed upon the following judgment:--

"(a) Ramchandra Murarilal Bhattad v. State of Maharashtra, reported in , AIR 2007 SC 401 (Paras 54, 57 & 58)."

He further submits that this Court should not exercise discretion in favour of the petitioner in view of the fact that the order of cancellation was passed on 31st January, 2014 and the same has been challenged by a writ application only in the month of August, 2015. There is no pleading in the writ application explaining the delay which has occasioned and such delay is attributable to the petitioner and that as such the writ application is liable to be dismissed on the ground of delay itself. In support of such contention reliance has been placed upon the judgments delivered in the following cases :

"(a) Joint Collector Ranga Reddy District and Another v. D. Narsing Rao and Others, reported in , (2015) 3 SCC 695(Paras 25, 26 & 31);

(b) State of M.P. v. Nandlal Jaiswal, reported in , AIR 1987 SC 251 (Paras 22 & 23)."

Placing reliance upon the averments made in the affidavit-in-opposition, Mr. Sengupta, learned advocate appearing for the State respondents submits that the Control Order of 2013 was notified on 8th August, 2013 and the same could not be placed before the Hon'ble Court in the writ application being W.P. No. 132 of 2012 as hearing in the said proceeding stood concluded and judgment was reserved in the month of July, 2013. The said order dated 14th August, 2013, having been delivered being oblivious of the provisions of the new Control Order of 2013 cannot operate as a binding precedent.

He further submits that no legal right has accrued in favour of the petitioner on the basis of the order dated 11th November, 2013 passed by the Director inasmuch as by virtue of the said order the selection cannot be construed to have attained finality inasmuch as the provisions of Clause 23 of the said Control Order of 2003 clearly provides that the order of the Director is subject to approval of the government and that no such approval was granted by the

government.

Drawing the attention of this Court to the provisions of Clause 42 of the Control Order of 2013, Mr. Sengupta submits that the Control Order of 2003 and the subsequent amendment thereto have been repealed and the proceedings initiated and continuing on the date of promulgation of the Control Order of 2013 have not been saved under the said Clause and that accordingly the earlier proceeding which went up to the stage of consideration by the Director cannot be directed to be concluded in terms of the said Control Order of 2003.

He further argues that the order of cancellation of the said vacancy was passed on 31st January, 2014 and the writ application challenging the same was filed before this Court almost 19 months thereafter on 24th August, 2015. There is no explanation towards such delay and such delay is attributable to the petitioner and in the backdrop of such admitted delay this Court should not exercise discretion in favour of the petitioner. In support of his contention, Mr. Sengupta has relied upon an unreported judgment dated 29th June, 2015 delivered in Tapan Sen v. State of West Bengal & Ors. and upon a judgment delivered in the case of Howrah Municipal Corpn. & Ors. v. Ganges Rope Co. Ltd. & Ors., reported in , (2004) 1 SCC 663 (paras 36 & 37).

In reply, Mr. Bhattacharyya submits that the alleged delay is neither malafide nor intentional and it cannot be said that the petitioner adopted dilatory tactics inasmuch as the petitioner had to wait till supply of a copy of the order dated 11th November, 2013 pursuant to the application made by the petitioner under the Right to Information Act, 2005. Furthermore, the Hon'ble Appeal Court on 16th July, 2014 kept it open for the petitioner to challenge the subsequent step and/or decision of the respondent authorities for filling up the said vacancy. Such steps were initiated by the respondents through issuance of the order dated 13th July, 2015 and immediately thereafter the petitioner preferred the writ application challenging the same in the month of July, 2015 itself and that as such there has been no delay on the part of the petitioner and the conduct of the petitioner does not on the whole warrant to castigate him. He further submits that unless the direction contained in the order dated 14th August, 2013 is taken to its logical conclusion, finality in a proceeding can never be reached. He further submits that the judgments relied upon by Mr. Bandopadhyay are distinguishable on facts and have no manner of application in the instant case. I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

A close perusal of the order dated 31st January, 2014 reveals that the government decided to cancel the said vacancy at Jamtalahat "considering that the situation regarding appointment against such vacancy has been materially changed". The said order is absolutely vague and there is no explanation as regards "the situation regarding appointment" and the order also does not mention the "material changes" which prompted the government to cancel the said vacancy. The government decided to cancel the said vacancy in a cryptic

manner without disclosing the grounds towards such cancellation. The said memorandum also does not reveal any independent application of mind on the part of the government and in arriving at the said decision there is no indication to the effect that the order of the Director dated 11th November, 2013 was at all considered. The order dated 31st January, 2014 is not legally sustainable due to breach of basic principle of law that every order passed by any administrative body or any quasi judicial body and/or even by the judicial body must disclose the reason, so that the person concerned who is affected thereby, may approach the higher forum and/or higher Court assailing the decision thereof.

6. The operative part of the judgment dated 14th August, 2013 runs as follows:--

"The Director shall decide the matter afresh. If he is dissatisfied with either the report of the sub-divisional controller or the recommendation of the district controller, then it shall be open to him to make a fresh enquiry and at that stage he may hear the two contesting parties. Thereafter, the matter shall be sent to the appropriate authority of the State Government."

7. The State respondents proceeded to act on the basis of the said judgment and the Control Order of 2003 as would be explicit from the memorandum dated 11th November, 2013 issued by the Director wherein it has, inter alia, been recorded that the DC, South 24 Parganas considered the enquiry reports of the SC, Baruipur and sent the records to the Directorate and that the Directorate agreed with the views of the DC and recommended the candidature of the petitioner herein for engagement as distributor in the vacancy at Jamtalahat.

8. A close perusal of the memorandum dated 31st January, 2014 reveals that it contained three directives. First was the decision to cancel the vacancy at Jamtalahat. Second was a direction upon the SC to initiate a fresh proposal in terms of the Control Order of 2013. Third was a direction to intimate all the applicants, whoever participated in the earlier process for filling up the vacancy at Jamtalahat, about its cancellation. The fact that the declaration of such vacancy "near the office of BDO" is consequential to the cancellation of the vacancy at Jamtalahat is explicit from the subject of the memorandum dated 31st January, 2014 which runs as follows:--

"Fresh proposal for vacancy of a distributor against the cancelled vacancy of Jamtalahat, Kultali P.S."

Mr. Bandopadhyay has argued in support of the government's decision towards cancellation of the said vacancy though fact remains that KFMC itself did challenge such decision of cancellation by a writ application being W.P. No. 10608 (W) of 2014 and the said writ application is still pending. Thus the arguments advanced on behalf of KFMC is an instance of reprobation of its contention as urged in the earlier writ application and the KFMC has now sort to wriggle out from such contradictory stand by submitting that it is ready and willing to withdraw the said writ application. From the report filed by DC it appears that in the fresh selection process KFMC has an edge over the other contestants and

that as such today it has been argued on behalf of KFMC that the government decision towards cancellation of the vacancy at Jamtalahat is appropriate and the such decision is not required to be interfered with.

9. Admittedly, the said vacancy was declared prior to promulgation of the Control Order of 2013 and that no appeal has been preferred by the State respondents against the order dated 14th August, 2013 and the State respondents proceeded in terms of the directions contained in the said judgment applying the provisions of the said Control Order of 2003. Though, the said Control Order of 2003 was repealed by the said Control Order of 2013 notified on 8th August, 2013, there is no indication from the steps taken by the State respondents on and from the date of delivery of the judgment and order on 14th August, 2013 till the date of cancellation of the said vacancy on 31st January, 2014 to the effect that the provisions of the new Control Order of 2013 would be applicable for filling up the said vacancy. Furthermore, in the affidavit-in-opposition filed by the State respondents in connection with W.P. No. 17744 (W) of 2015 it has been categorically stated that "it is denied that the vacancy was cancelled upon repeal of the Control Order of 2003 only, as alleged".

10. The point of delay as urged by Mr. Bandopadhyay is not acceptable to this Court. The said vacancy was cancelled by an order dated 31st January, 2014. The writ application being W.P. No. 10608 (W) 2014 was preferred by KFMC impleading the petitioner herein and an order was passed in the same in the month of June, 2014. Aggrieved by the said order the petitioner preferred an appeal which was dismissed by an order dated 16th July, 2014 observing, inter alia, that such dismissal will not prevent the appellant from challenging the subsequent steps or decision of the respondent authority for filling up the vacancy of distributor at Jamtalahat by filing appropriate application in connection with the pending writ petition (W.P. No. 10608 (W) of 2014). Subsequent thereto step was taken for filling up a vacancy "at near the office of BDO under Kultali Block" on 13th July, 2015 and challenging the same the petitioner filed the writ application being W.P. No. 17744 (W) of 2015 on 27th July, 2015. Thereafter the petitioner independently challenged the memorandum dated 31st January, 2014 by the writ application being W.P. No. 21333 (W) of 2015 on 24th August, 2015. Instead of filing an application in the pending writ application, in terms of the Appeal Court order dated 16th July, 2014, the petitioner preferred an independent writ application challenging the memorandum dated 13th July, 2015. This Court does not find any infirmity in such action of the petitioner.

11. The above sequence explains the delay as urged by the respondents and it is clear that there was no deliberate delay on the part of the petitioner to challenge the memorandum dated 31st January, 2014 and 13th July, 2015. No negligence or inaction or want of bona fide is imputable to the petitioner. As such, this Court is of the opinion that the writ applications cannot be dismissed on the ground of delay.

12. On the contrary there was a delay in the decision making process on the part of the State respondents inasmuch as the cancellation of the said vacancy at Jamtalahat was on 31st January, 2014 whereas decision to fill up the said vacancy was adopted almost 17 months thereafter on 13th July, 2015. The said period of delay stands unexplained on the part of the State respondents. Thus without any reasonable explanation for such delay in the decision making process, the respondent authorities cannot take shelter behind promulgation of a new Control Order, which would have the effect of negating the directions of this Court contained in the judgment dated 14th August, 2013. In my opinion, a legal right accrued in favour of the petitioner by virtue of the judgment and order delivered by this Court on 14th August, 2013 and the petitioner has every right to challenge the abrupt cancellation of the said vacancy on 31st January, 2014.

The recommendation issued in favour of the petitioner by the respondents as explicit from the order dated 11th November, 2013 are not mere notings in a departmental file but the said recommendation is an expression of opinion by the competent authority in exercise of the jurisdiction conferred upon it by the Control Order. As such the judgments delivered in the case of M/S Sethi Auto Service Station (Supra) and P. Suseela (Supra) have no manner of application in the instant case. It is true that it is always open to the government not to fill up a vacancy but there has to be a valid reason for adopting such a course of action. The contention of the private respondent to the effect that the cancellation of the vacancy was a policy decision does not even stand reflected in the impugned order. The impugned order dated 31st January, 2014 does not reveal any independent application of mind on the part of the State respondents as regards the requirement to cancel the said vacancy at Jamtalahat and to create a new vacancy in its place and stead "at near the office of BDO under Kultali block". The said location pertaining to the vacancy notice dated 13th July, 2015 is only 200 meters away from the location of the said vacancy. Thus, the necessity of a distributorship under Kultali block exists but there is no reason why such vacancy is required to be shifted from Jamtalahat to "near the office of BDO" both of which under Kultali block. As such, the decision towards cancellation of the said vacancy at Jamtalahat is not sustainable in law. The judgments delivered in the case of Ramchandra Murarilal Bhattad (Supra), Manoj Manu (Supra) and Raj Rishi Mehra (Supra) are, thus, distinguishable on facts.

For the reasons discussed above, this Court is of the opinion that the decision of the government to cancel the said vacancy of distributorship at Jamtalahat as indicated by the memorandum dated 31st January, 2014 is unsustainable in law and such decision is, accordingly, set aside. The appropriate authority of the State Government is directed to take a fresh decision as regards the approval of the order of the Director dated 11th November, 2013 and to communicate the said decision to the petitioner within a period of 6 weeks from the date of communication of this order.

Till such communication of the decision, the vacancy notice dated 13th July, 2015

issued by the District Controller (F & S) South 24 Parganas, Alipore shall remain stayed and the respondents shall not take any further steps to fill up the vacancy of distributorship "at near the office of BDO under Kultali block" as notified by the said memorandum dated 13th July, 2015.

With the above observations and directions, both the writ applications, being W.P. No. 21333 (W) of 2015 and W.P. No. 17744 (W) of 2015 are disposed of.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.