

(2019) 08 CAL CK 0104

In the Calcutta High Court

Case No : Civil Application (CAN) No. 9891 Of 2018, 289 Of 2019 In C. Appeal From Order (FMA) No. 85, 86 Of 2019, Tender Of Mand Appl (MAT) No. 1180 Of 2018, 28 Of 2019

Birendra Nath Dey And Others

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 02-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 08 CAL CK 0104

Hon'ble Judges : Biswanath Somadder,M J;Arindam Mukherjee, J

Bench : Division Bench

Advocate : Utpal Bose, Pradip Kumar Roy, Joydeep Roy, Shraboni Sarkar, Moloy Kumar Basu, Milan Chandra Bhattacharya, Ashoke Banerjee, Sagar bandopadhyay, Sulagna Bhattacharya, Amitesh Banerjee, Tarak Karan,

Final Decision : Disposed Of

Judgement

Arindam Mukherjee, J

1) Two appeals being FMA 85 of 2019 (Udyog Traders Vs. Birendra Nath Dey and Ors.) and FMA 86 of 2019(Birendra Nath Dey Vs. The State of West Bengal & Ors.) are heard together not only because they arise out of the same judgment and order dated 11th September, 2018, but also for the reason that a decision in one of the appeals will have an impact on the other. The writ petition being WP 6100 (W) of 2015 (Birendra Nath Dey Vs. The State of West Bengal & Ors.) was filed by the appellant (in FMA 86 of 2019) (for the sake of convenience we hereinafter referBirendra Nath Dey as the writ petitioner).In the said writ petition, Udyog Traders, the appellant in FMA 85 of 2019, was respondent No.8 (for the sake of convenience, we hereinafter refer the appellant as Udyog Traders).

2) The facts leading to the filing of the writ petition are as follows:-

a) On 8th September, 2009, the District Controller, Food and Supplies, Murshidabad invited applications from bona fide Indian citizen with "sound financial capacity" and "experience in business" for being appointed as an MR Distributor at Banjetia, Berhampore, in the district of Murshidabad. The application was to be made on plain paper and also in Form 'A' to be collected from the MR Section of the office of District Controller, Food and Supplies, Murshidabad.

b) The Form 'A' appears to be in terms of paragraphs 19(II) and 23(III) of the West Bengal Public Distribution System (Maintenance and Control) Order, 2003 (hereinafter referred to as the said Control Order).

c) Pursuant to such advertisement, the writ petitioner and Udyog Traders along with several others applied for being appointed as MR Distributor.

d) The Sub-Divisional Controller, Food and Supplies Department, Berhampore, Murshidabad being the respondent No.7 in the writ petition made a physical inquiry as to the godowns and also verified the particulars furnished by the intending candidates as to the financial capacity and experience in business.

e) The said respondent No.7, on 19th February, 2010 submitted his detailed report to the District Controller, Food and Supplies Department, Murshidabad being the respondent No.6 in the writ petition. The report in respect of Udyog Traders and the writ petitioner are as follows:-

"1) Udyog Traders:- It is a registered partnership firm consisting of nine partners having business with food grains. During enquiry second signature of the applicant has been obtained and found identical. The rest signatures of eight partners have also been taken on their presence before me on 30.12.2009.

Exact address of Proposed Go-down

Plot No.-99/276, Khatian No.-62

Mouza Nagpara, P.S - Berhampore.

Verified the rent agreement, a Xerox copy of which is enclosed herewith.

Measurement of the Go-down:-

Length - 41 ft 4 inches

Breadth- 35 ft 8 inches

Height - 18 ft 10 inches

Go-down attached office room at the South-East Corner of the Go-down-

Length - 8ft

Breadth -7 ft 2 inches

Height - 10 ft.

This is a Pucca Go-down with R/C roof and pucca floor with damp proof pitch work.

Boundary :-

North-Vacant land.

South-Shop of Mondal Motors.

East- Wide open space in front of the Go-down and entrance passage attached with Jalangi Road.

West- Village Road.

During enquiry they produced sketch map of the proposed Go-down which is enclosed house with.

This is a pucca Go-down with R/C roof and pucca floor situated at the centre place of Banjetia. The Go-down is the spacious one and suitable for the M.R.D. Distributorship business. There is a wide vacant land in front of the Go-down i.e. at the entrance of the Go-down, which will be very helpful for standing trucks and carts for loading and unloading of food grains.

Financial Capability:- The financial capability of the firm Rs.22,39,925/- (Rupees Twenty Two Lakh Thirty Nine Thousand Nine Hundred Twenty Five only) as on 23.12.09 i.e. up to date of enquiry, verified from Bank Statement current A/C No.-421020110000108 of the firm in Bank of India Berhampore Branch a Xerox copy is enclosed herewith. As per produced documents, the firm has the financial capability to function M.R. distributor business.

Trade license :- Udyog Traders produced their existing Trade license along with Provisional Trade license for the said M.R. distributorship from Hatinagar G.P Xerox copies of all are enclosed herewith.

The local reputation of the firm as well as of the partners is good. The firm has submitted a declaration that they agreed to abide by the rules and directives of the Department time to time, which is enclosed herewith."

"5) Shri Birendra Nath Dey :-

It is an individual application. During enquiry second signature of the applicant obtained and found identical.

Exact address of the proposed Go-down :-

Plot No. - 57, Kh No. - 838, Mouza - Nagpara.

Owner of the land is the applicant.

Verified from Rega Deed. A Xerox copy of which is enclosed herewith.

Measurement of the Go-down :-

Go-down (1) - Length - 96 ft

Breadth - 32 ft

Height - 19 ft 5 inches.

This is a Pucca Go-down with R/C roof and pucca floor.

(2) - Length - 69 ft

Breadth - 29 ft 5 inches

Height - 17 ft 5 inches

This is a pucca Go-down with R/C roof and Pucca floor.

During enquiry there were huge stocks of food grains in both the Go-downs.

Boundary :-

Go-down(1):-

East - Go-down of Sudhir Kr. Mandal.

West - Go-down of Arun Addya

North - Vacant land Lt. Sunil Dey.

South - Vacant land of the owner with entrance.

Go-down(2):-

East - Go-down of Sudhir Kr. Mandal.

West - own Go-down.

North - Vacant land of Lt. Sunil Dey.

South - Vacant land of the owner with entrance.

Sketch map of the Proposed Go- downs were not submitted. The Go-down, as verification, appear to be in storage of M.R. Commodities.

Financial Capability:- Rs.1283262.19 as on 23.12.09 A/C No.10574032648 in the State Bank of India Lalbagh Branch, Verified from Bank Statement a Xerox copy of which is enclosed herewith.

Shri Dey also submitted letter of consideration of O/D upto Rs.30.00 lakhs as prayed for by the applicant.

Shri Dey produced provisional Trade Licence for Rice Wholesale business from Hatnagar Gram Panchayet. Nothing heard adverse against him in the locality.

Shri Birendra Nath Dey is a Storing Agent, NREP, (Relief) of Jiaganj, Murshidabad. He is also a Distributor of Mid-Day Meal and the proposed Go-downs shown for M.R. Distributorship were already being utilized in his existing

business".

f) Considering the said report submitted by the respondent No.7, the respondent No.6 made his recommendation on the inquiry report by a memo dated 17th March, 2010, which was addressed to the Director, District Distribution, Procurement and Supply, Government of West Bengal being the respondent No.3 in the writ petition. The said memo of the recommendation made by the respondent no.6 contains the particulars in respect of Udyog Traders and Birendra Nath Dey, the writ petitioner, the relevant portions whereof are reproduced hereunder:-

"In view of the above facts it appears that in respect of financial condition and storing place, Sl. No.1, candidature of "Udyog Traders" is more suitable for M.R. Distributorship business and may be considered for appointment of M.R. Distributorship against the vacancy notification as mentioned above".

g) Finally the Joint Secretary to the Government of West Bengal by a memo dated 6th August, 2010 addressed to the respondent No.3 approved the appointment of Udyog Traders as an MR Distributor at Banjetia, P.S-Berhampore, Dist.-Murshidabad.

h) The respondent No.6 by a memo dated 9th August, 2010 finally gave the appointment to Udyog Traders but it was specifically mentioned in the said memo that appointment will abide by the result of the Writ Petition No.1030 of 2010 (Birendra Nath Dey Vs. State of West Bengal & Ors.).

i) It is, therefore, apparent that prior to the final appointment granted by the authorities, the writ petition was filed. Record also reveals that in the said writ petition on 6th August, 2010, the following order was passed:-

"The Court : Affidavit-in-opposition be filed within four weeks from date. Affidavit-in-reply thereto, if any, be filed within two weeks thereafter. Matter be listed on the following working day as "For Orders".

Any action taken shall in the meanwhile abide by the result of the writ application."

The appointment letter, therefore, contained the stipulation as aforesaid.

3) It further appears that the writ petition was amended subsequently to the amendment application made by the writ petitioner being allowed on contest after affidavits.

4) After considering the materials on record and the respective submissions the learned Single Judge held that the inquiry report of the respondent No.7 is perverse as a consequence whereof the recommendation made by the respondent No.6 on the basis thereof is vitiated and as such the final result being the appointment of Udyog Traders as an MR distributor is not sustainable.

5)The learned Single Judge, therefore, has quashed the appointment and has

directed fresh invitation of application in terms of the provisions for appointment of MR distributor now in force.

6) Before us the main grievances of the writ petitioner are,inter alia, as follows:-

i) The respondent Nos.6 and 7 did not consider the financial capacity of the writ petitioner in accordance with the documents furnished in the application. The writ petitioner has two bank accounts, one with the State Bank of India (SBI) and the other with Bank of Baroda. The balance of account maintained with SBI was considered but that in the account maintained with Bank of Baroda was not considered. Had the two accounts been considered the documents in respect whereof were on record, the available balance in the two accounts would have been about Rs.30 lakhs, which is much in excess of Rs.22 lakhs being the balance in the account of Udyog Traders which the authorities have considered in selecting Udyog Traders.

ii) Moreover, the writ petitioner had been approved an overdraft facility by the Bank of Baroda to the tune of Rs.30 lakhs. Considering all these parameters, the writ petitioner was undoubtedly with much better financial capacity than Udyog Traders, who have been given the appointment as MR Distributor.

iii) In the Form 'A', the business experience column of Udyog Traders is blank whereas the writ petitioner at that relevant point of time was holding a distributorship licence of Mid-Day-Meal and Storing Agency of N.R.E.P (Relief) of Jiaganj, Murshidabad.

iv) The writ petitioner, therefore, was much ahead of Udyog Traders both in financial capacity and experience in business being the two parameters mentioned in the notice inviting applications issued by the respondent No.6.

v) Moreover, the respondent No.6 tried to neutralize the business experience of the writ petitioner by recording that the existing business of the writ petitioner was in Jiaganj and not at Banjetia.

vi) In terms of the godowns offered, the writ petitioner was in a position to provide two godowns which were much larger in size with greater storing capacity as will appear on a bare perusal of the inquiry report of the respondent No.7 prepared after physical verification. The respondent No.6 held that Udyog Traders was more suitable than the writ petitioner on the ground that the godowns agreed to be provided by the writ petitioner was utilised in the distributorship business of Mid-Day-Meal and Storing Agency of N.R.E.P (Relief) of Jiaganj, Murshidabad. So the same may not be considered for conducting MR distributorship business. The writ petitioner says that one of the godowns has not been considered by the respondent No.6 and 7. In any event, the godowns could not have been compartmentalised being huge in size and if the respondent Nos.6 and 7 wanted them to be vacant, the goods could have been removed elsewhere. The respondent No.7 never raised this issue while enquiring and the respondent No.6 while making the recommendation did not seek any clarification from the

writ petitioner. The writ petitioner could have shifted the materials to some other godown as he had several other godowns. The respondent No.6 and 7 without deliberating with the writ petitioner in this regard came to a conclusion that the godowns offered by the writ petitioner are insufficient or unfit for being considered.

vii) The writ petition says that the appointment of Udyog Traders is void as the authorities have acted illegally, wrongfully and in an arbitrary manner to eliminate the writ petitioner.

7) The Udyog Traders, on the other hand, says that the authorities have rightly appointed them after finding their godown space to be more suitable and they are financially more solvent. The writ petitioner has not challenged the inquiry report of the respondent No.7 or the recommendation made by the respondent No.6. In absence of such challenge, it is not open for the writ petitioner to contend that the appointment of Udyog Traders is void or a product of illegal, unlawful and arbitrary act of the authorities. They further state that the two godowns offered by the writ petitioner were filled with materials and, as such, has been rightly found by the authorities to be unfit for being considered. Udyog Traders further submit that they have business experience and their reputation is very high as correctly recorded by the respondent No.7. That apart in any event, the two godowns offered by Udyog Traders had more storing capacity. On behalf of Udyog Traders with regard to the scope of judicial review as to an executive action in respect of distribution largess, the following judgments have been cited:-

i) 1990 (1) SCC 305 (Dalpat Abasaheb Solunke and Ors. Vs. Dr. B.S. Mahajan and Ors.).

ii) 2016 (8) SCC 446 (Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed Private Limited and Ors.).

iii) 2017 (2) SCC 599 (Union of India Vs. Rajasthan High Court and Ors.).

8) The State (respondent No.1) did not use any affidavit before the learned Single Judge but in order to ascertain their stand, we have allowed them to use an affidavit at the appellate stage. The State in its affidavit has tried to justify the decision of the respondent Nos. 3, 6 and 7. The State has urged that the godowns offered by the writ petitioner being in use for distributorship of Mid-Day-Meal and Storing Agency of N.R.E.P (Relief) of Jiaganj, Murshidabad is stacked with sacks of food grains and as such, it will be impossible for anyone to keep a check and balance in respect of the stock of food grains required to be stored as an MR distributor vis-a-vis Storing Agency of N.R.E.P (Relief). If the same godown is allowed to store materials under two separate distributorships, it is impossible to keep track of which material relates to which distributorship and there is always an apprehension of misuse and misutilisation of the materials under two separate distribution systems. This guided the authorities and rightly so to choose Udyog Traders instead of the writ petitioner.

9) Udyog Traders in their appeal has challenged the entire order being setting aside of their appointment as MR distributor. On the other hand, the writ petitioner in his appeal has challenged that portion of the order of the learned Single Judge which directs holding of fresh selection process in accordance with the prevailing norms for appointment of MR distributor. The writ petitioner says that the learned Single Judge ought to have appointed them as MR distributor upon finding that inquiry report was perverse, the recommendation made on the basis thereof being vitiated and the consequent end result, i.e., appointment of Udyog Traders is bad in law.

10) We have considered the materials on record, submissions made by the respective parties, their pleadings and the judgments cited by the parties and find that there is no scope of interference to the order under appeal for the following reasons:-

i) Paragraphs 19(II) and 23(III) of the said Control Order clearly lay down the procedure as to how the appointment of distributor should be made.

ii) The respondent No.7 shall enquire and prepare a report. This report with his comment has to be sent to the respondent No.6. The respondent No.6 shall forward the same with his recommendation to the respondent No.3 being the appointing authority. The respondent No.3 will consider such recommendation and make the appointment. It is also open to the respondent No.3 to arrange inquiry into the matter by a competent officer or by a team if he does not agree with the inquiry report of the respondent No.7 or the recommendation of the respondent No.6.

iii) In the instant case, we find that the procedure envisaged under the said Control Order has been followed though the time-frame mentioned therein may not have been adhered to in strict sense. We also notice that the respondent No.3, in the instant case, agreed with the inquiry report of the respondent No.7 and the recommendation of the respondent No.6. But on a bare perusal of the enquiry report of the respondent No.7 and comparing the particulars of the writ petitioner and Udyog Traders provided in their respective applications, we find that one of the bank accounts of the writ petitioner has not been admittedly considered. The certificate issued by Bank of Baroda with regard to the balance in the account of the writ petitioner maintained with it has been clearly specified. The said certificate is a part of original filled in application form of the writ petitioner which has been produced by the respondent-authorities. It is clear that the said account of the writ petitioner if had been considered, the financial capacity of the writ petitioner would have been held to be better than that of Udyog Traders. The enquiry report of the respondent No.7 is, therefore, perverse as rightly held by the learned Single Judge.

iv) We also notice from the advertisement that experience in business is one of the two parameters to be considered. In the inquiry report of the respondent No.7, there is no specific finding as to the business experience of Udyog Traders

though there is a clear recording of the business experience of the writ petitioner. It is, therefore, clear from the plain reading of the inquiry report of the respondent No.7 that the comparative analysis as to the business experience of the applicant is missing. The report has, therefore, to be held as arbitrary.

v) It is apparent that the respondent No.7 has not applied his own mind and has simply made a recommendation on the basis of the inquiry report of the respondent No.6. It is also apparent that the respondent No.6 himself did not even look into the documents which formed part of the application form of the writ petition. Had he done so, he ought to have noticed the second bank account of the writ petitioner which has been missed out by the respondent No.7. The respondent No.6 also did not make any inquiry after perusing the inquiry report of the respondent No.7 with regard to the number of godowns and the godown space offered by the writ petitioner when the report indicates that the writ petitioner's godown is partially occupied. He simply reads that the godown space offered by the writ petitioner is not available for having stored other materials.

vi) From the inquiry report of the respondent No.7, it is apparent that the godown space offered by the writ petitioner is much in excess of that offered by Udyog Traders. In such a situation, a fair approach should have been to ask the writ petitioner whether he is agreeable to make internal partition so that separate space was available to store materials as M.R Distributor. The respondent No.7 has not undergone such exercise. In absence of an independent scrutiny of the records, the recommendation of the respondent No.6 is arbitrary, irrational and unreasonable.

vii) On a plain reading of the inquiry report and comparing the same with the particulars furnished by the parties in their respective application form when arbitrariness and perversity is noticed which is followed by an arbitrary, irrational and unreasonable recommendation, both the inquiry report and the recommendation are required to be interfered with in the matter of judicial review even if the same has not been separately challenged. In fact, the judgment rendered in the case of Bakshi Security and Personnel Services Private Limited (supra) cited by the Udyog Traders allows the Court to interfere with an executive decision on being found arbitrary, irrational and unreasonable is not made lawfully which requires to be checked. The judgment in Union of India (supra) has no manner of application in the facts of the instant case.

viii) The respondent No.3 has also not scrutinised the document and applied his independent mind before accepting the recommendation of the respondent No.6 made on the basis of the inquiry report of the respondent No.7. As a consequence thereof, the end result is also tainted with arbitrariness, irrationality and unreasonableness, such a decision is also required to be checked by the Court after it notices the same.

ix) The entire process is, therefore, vitiated. It is not merely a procedural aberration or error in assessment or prejudice to the writ petitioner but is a

decision not made lawfully.

x) The recommendation of the respondent No.6 based on the inquiry report of the respondent No.7 also gives rise to a reasonable doubt as to whether the same was intended to favour Udyog Traders. In fact, the bona fide of the respondent Nos.6 and 7 is in doubt. The Court, in such a situation, may exercise its discretion in not interfering with the executive decision ignoring that doubt as held in *Dalpat Abasaheb Solunke (supra)* cited by Udyog Traders. However, in view of our finding concurring with the findings of the learned Single Judge that the enquiry report of the respondent No.7 is perverse and the recommendation of the respondent No.6 is arbitrary, irrational and unreasonable, we are not inclined to use our discretion in not interfering with the executive decision. We rather intend to interfere with the executive direction by upholding that part of the order of the learned Single Judge.

11) In view of the observations as aforesaid, we hold that the grant of M.R. Distributorship made in favour of Udyog Traders is not lawful and as such has been rightly struck down by the learned Single Judge. The appeal being FMA 85 of 2019 (*Udyog Traders Vs. Birendra Nath Dey and Ors.*) fails and is accordingly dismissed without, however, any order as to cost.

12) So far FMA 86 of 2019 (*Birendra Nath Dey Vs. The State of West Bengal and Ors.*) is concerned, we are of the view that the issue of appointment of the writ petitioner as an M.R. Distributor on the decision in favour of Udyog Traders being set aside is not an obvious choice. The claim of the writ petitioner in this regard is dependent on several factors which are mixed question of law and fact. The claim of the writ petitioner to appoint him in place of Udyog Traders, cannot, therefore, be decided in exercise of jurisdiction of Article 226 of the Constitution of India. Moreover, the long passage of time, changes in the Control Order also prevent us from automatically appointing the writ petitioner after the appointment of Udyog Traders being set aside. The writ petitioner is free to claim damages for not having been appointed and thereby being deprived but the writ petitioner cannot directly claim appointment as M.R. Distributor in the place of Udyog Traders.

13) We are alive to the initial order dated 6th August, 2010, as also to the stipulation in the appointment letter even after considering the same but we cannot at this state issue a mandamus directing appointment of the writ petitioner in the place and state of Udyog Traders. The learned Single Judge has rightly held that fresh process has to be initiated for appointment of M.R. Distributor in the concerned area, we also subscribe to that view. That apart and in any event, the West Bengal Public Distribution System (Maintenance and Control) Order, 2013 now operate in the field replacing the said Control Order. Steps, therefore, are required to be taken in accordance with the 2013 Control Order.

14) During the course of hearing of the appeal by an order dated 21st January,

2019 Udyog Traders had been directed to deposit a sum of Rs.12,00,000/- (Rupees Twelve Lakhs only). By a further order dated 31st January, 2019, the said sum was directed to be invested in a short term deposit with a nationalised bank. We direct that the said sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) with accrued interest thereon should be kept renewed by the Registrar General of this Court for a further period of 8 months from date. The writ petitioner will be at liberty to file a civil suit claiming damages, if any, suffered by it on the writ petitioner not being selected as M.R Distributor. If such suit is filed within a period of 8 months from date, then the money deposited by Udyog Traders shall remain re-invested from time to time until further order from the Civil Court. It will be open to Udyog Traders to claim release and/or refund of the sum so deposited with accrued interest if no suit is filed by the writ petitioner within the period of eight months from date.

With these observations, we dispose of the appeal being FMA 86 of 2019.

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

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis.

(Arindam Mukherjee, J.) (Biswanath Somadder, J.)

Later :

After the judgment and order is pronounced in open Court, the original papers / documents which are lying in the Court's custody shall be returned forthwith to the learned Advocate for the State.