

(2013) 10 CAL CK 0024
In the Calcutta High Court
Case No : Writ Petition No. 340 (W) of 2010

Bodrul Alam Mallick

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : AIR 2014 Cal 29 : (2014) 1 CHN 272

Hon'ble Judges : D. Datta, J

Bench : Single Bench

Advocate : Debabrata Saha Roy, Syed M. Rahaman and Mr. P. Bhattacharya, for the Appellant; S. Sengupta and Mr. S. Chatterjee for State, for the Respondent

Final Decision : Dismissed

Judgement

D. Datta, J.—The petitioner is the proprietor of M/s. National Oil Trading Company. License was issued in favour of his proprietorship firm by the Director of Consumer Goods, respondent no. 2, to carry on business as an agent in kerosene oil from the depot for supplying it in markets in the whole of the sub-division of Uluberia in the District of Howrah. A show cause notice dated September 12, 2008 was issued by the Joint Director of Consumer Goods, Government of West Bengal to the petitioner conveying to him certain irregularities detected by a special checking team that had visited his kerosene oil business centre, when he was found to be absent. The notice referred to a report dated November 19, 2008 of the District Controller (F & S), Howrah, respondent no. 4, and called upon the petitioner to explain within 7 days why departmental action shall not be taken against him for violation of the terms and conditions of the license issued to him.

2. The reply to the show cause notice was given by an advocate engaged by the petitioner by her letter dated September 22, 2008. It was contended therein that the show cause notice suffered from want of jurisdiction inasmuch as it is the District Magistrate, Howrah who had the authority to issue such notice and not the Joint Director. Reference was made to paragraph 9 of the West Bengal

Kerosene Control Order (hereafter the Control Order) and to an unspecified judicial pronouncement. A prayer was, accordingly, made for withdrawal of the show cause notice.

3. The reply to the show cause notice was considered by the Director. By an order dated January 9, 2009, the Director proceeded to suspend the license issued in favour of the proprietorship firm of the petitioner. He was also asked to show cause within 7 days as to why the license shall not be terminated for contravention of the provisions of the Control Order. The report of the District Controller dated November 19, 2008 was enclosed with the order.

4. The petitioner responded to the Director by his reply dated January 13, 2009. He was also personally heard by the Director on January 28, 2009. An order was passed on February 5, 2009 by the Director canceling the license in exercise of power conferred on him by paragraph 9(iii) of the Control Order in the interest of the general public and the public distribution system of S.K. Oil. A finding of fact was recorded that the petitioner had made unauthorised sale of 24 kl. of S.K. Oil lifted by him on August 1, 2008 from the oil marketing company outside the public distribution system, thereby amounting to misappropriation of such stock.

5. Paragraph 10 of the Control Order provided a remedy of appeal to the petitioner. Such remedy was pursued by him by carrying the order dated February 5, 2009 in appeal before the State Government. The appeal was considered by the Principal Secretary Food and Supplies Department and Commissioner of Food, Government of West Bengal. In connection therewith, a hearing was granted to the petitioner. Upon consideration of the submissions advanced by the learned advocate who represented the petitioner and the Joint Director who represented the Director, the appellate authority concurred with the finding of the Director that there had been misappropriation of 24 kl. of kerosene oil meant for the public distribution system by the petitioner through unauthorised sale. The order of cancellation of licence was confirmed and the appeal stood rejected.

6. The order of the appellate authority dated November 12, 2009 confirming the order dated February 5, 2009 passed by the Director is under challenge in this writ petition.

7. Mr. Saha Roy, learned advocate appearing for the petitioner raised 4 (four) points in support of the relief claimed in the writ petition. First, it was contended that the Director had no authority to cancel the licence; secondly, he urged that the final order was not passed within 30 days from the date of service of the notice of suspension and this is in violation of paragraph 9 of the Control Order; thirdly, the report of enquiry of the District Controller was not served on the petitioner; and fourthly, the appellate authority did not deal with all the points that were raised in the appeal.

8. Since neither of the points raised by Mr. Saha Roy was considered to be of any worth, I did not consider it necessary to call upon the respondents to answer.

9. For appreciating the first contention raised by Mr. Saha Roy, provisions contained in paragraphs 5 and 9 of the Control Order are required to be read. The same are reproduced below:

5. Grant of licence to agent. -

(1) The Director may grant a licence to any agent in West Bengal authorising him to carry on trade in kerosene as such agent.

(2) A licence granted under sub-paragraph (1) shall be in Form A and shall be subject to such conditions as are specified therein and such other conditions as the Director may lay down from time to time in the interest of fair distribution of kerosene within the State.

(3) No agent shall sell, supply or transfer kerosene to any person other than a dealer duly licensed under paragraph 6 of this Order, or a holder of a permit or delivery order issued under paragraph 11 of this Order.

9. Cancellation or suspension of licence. -

If it appears to the Director or the District Magistrate having jurisdiction that an agent or a dealer has indulged in any malpractice or contravened any provision of this order or any condition of the licence or any direction given under paragraph 12 of this order, he may forthwith ask the Agent or the Dealer to show-cause for violations made or suspend the licence:

Provided that the agent or the dealer who has been asked to show-cause or whose licence has been suspended shall be given an opportunity of being heard and the Director or the District Magistrate having jurisdiction shall pass an order in writing within 30 days from the date of serving the show-cause notice or suspension of the licence taking any or all of the actions given below.

(i) He may let off the Agent or Dealer if sufficient cause has been shown.

(ii) He may pass an order by imposing a penalty which according to the gravity of the violations made will not be less than Rs. 10,000 in case of an Agent and Rs. 2,000 in case of a Dealer and revoke the suspension order if already served.

(iii) He may cancel the licence:

Provided that the order shall be passed ex parte if the Agent or the Dealer whose licence has been so suspended or on whom show-cause notice has been served fails to appear at the hearing.

10. According to Mr. Saha Roy, although the Director is the licensing authority, the power to cancel or suspend a licence vests in the Director in respect of agents carrying on business in Kolkata and in the District Magistrates of the respective districts where the agents carry on business. Since the proprietorship firm of the petitioner was granted licence to carry on business from its depot in the district of Howrah, it is the District Magistrate, Howrah who could have exercised jurisdiction for cancellation of the licence issued in favour of such

proprietorship firm and not the Director.

11. Elaborating his submission on the point, Mr. Saha Roy submitted that the reading of the entire Control Order would reveal demarcation of two different areas for exercise of jurisdiction by the Director and the District Magistrate having jurisdiction. The Director and the District Magistrate would be empowered to exercise their respective jurisdiction or authority in respect of the respective areas mentioned in the Control Order. In support thereof, Mr. Saha Roy relied on the decision dated August 14, 2003 of a learned Judge of this Court in W. P. 527 of 2002 (Hooghly District Kerosene Dealers' Association and ors. v. State of West Bengal and ors.).

12. Reliance was also placed on the decisions of two Division Bench decisions of this Court in APOT 367 of 2009 (M/s. Lachmi Narayan Bhomraj v. Ranjit Kumar Murmu and ors.) dated September 16, 2009 and APOT 237 of 2010 (Ranjit Kumar Murmu v. M/s. Lachmi Narayan Bhomroj and ors.) dated February 2, 2012. I shall deal with these decisions at a later part of this judgment.

13. Paragraph 10 of the Control Order was amended by notification no. 3575-FS, dated November 25, 2003. After such amendment, paragraph 10 reads as follows:

10. Appeal. -

(a) Any person aggrieved by an order passed under paragraph 8 or paragraph 9 of this order, may within 30 days from the date of the order, prefer an appeal to the State Government in the Food and Supplies Department.

(b) elsewhere, -

(i) where the order is passed by the District Magistrate or the Deputy Commissioner of a district, to the State Government,

(ii) where the order is passed by any other officer authorised by the District Magistrate or the Deputy Commissioner of a district under clause (e) of paragraph 3, to the District Magistrate or the Deputy Commissioner, as the case may be, of the district.

14. Before such amendment, paragraph 10 read as follows:

10. Appeal. -

(a) Any person aggrieved by an order passed under paragraph 8 or paragraph 9 of this Order, may within 30 days from the date of the order, prefer an appeal -

(a) in Calcutta, -

(i) where the order is passed by the Director of Consumer Goods, Department of Food and Supplies, to the State Government,

(ii) where the order is passed by any other officer authorized by the State

Government under clause (d) of paragraph 3, to the Director of Consumer Goods, Department of Food and Supplies, and

(b) elsewhere, -

(i) where the order is passed by the District Magistrate or the Deputy Commissioner of a district, to the State Government,

(ii) where the order is passed by any other officer authorised by the District Magistrate or the Deputy Commissioner of a district under clause (e) of paragraph 3, to the District Magistrate or the Deputy Commissioner, as the case may be, of the district.

15. The decision in Hooghly District Kerosene Dealers' Association (supra) was rendered on August 14, 2003 i.e. before paragraph 10 was amended. I am of the view, for reasons to be discussed hereafter, that the said decision is of no relevance for the purpose of deciding the point raised by Mr. Saha Roy having regard to the amendment that was effected in paragraph 10, as noticed above.

16. Issuance of a licence to an agent to deal in kerosene oil in West Bengal is a matter exclusively within the domain of the Director, in view of paragraph 5 of the Control Order. Bifurcation of the State into two distinct areas i.e. "Calcutta" [as defined in paragraph 3(b) of the Control Order] and "elsewhere" as mentioned in clause (b) of paragraph 10 of the Control Order, meaning thereby areas beyond Calcutta, as it stood before November 25, 2003, could lend support to an argument that the Director could exercise the powers in respect of matters covered by paragraph 6A of the Control Order before its omission by notification no. 3575-FS dated November 25, 2003; clause (ii) of the 1st proviso to sub-paragraph (1) of paragraph 7 as well as sub-paragraph (4) thereof; and paragraphs 8, 9, 11, 12, 13 & 15, only in Calcutta.

17. The notification dated November 25, 2003 amending paragraph 10, however, brought about a discernible change not only in respect of conferment of power and authority on the Director for cancellation of an agent's licence (issued under paragraph 5) in any area in the State of West Bengal and not confined to Calcutta [as defined in paragraph 3(b)] only, but also provided a forum for appeal against orders passed under other provisions of the Control Order, which hitherto before could not have been appealed against. In paragraph 10, as it stands now, the words "in Calcutta" and those following it against clause (a), viz. "where the order is passed by the Director ..." or "where the order is passed by any other officer ..." appearing in pre-amended paragraph 10 have been done away with, meaning thereby that all orders under paragraph 8 or paragraph 9, whosoever might have passed it, - be it the Director or the District Magistrate having jurisdiction, may be carried in appeal before the State Government. In other words, sub-paragraph (a) of paragraph 10, as it stands now, refers only to orders passed under paragraph 8 or paragraph 9, and any order passed thereunder either by the Director or the District Magistrate having jurisdiction can be made the subject matter of an appeal before the State Government in the

Food and Supplies Department within 30 days. The word "elsewhere" in pre-amended sub-paragraph (b) of paragraph 10 was referable to the geographical location beyond Calcutta, whereas after the amendment it ought to be construed as referring to the provisions of the Control Order other than paragraphs 8 and 9. Thus an order passed by the District Magistrate in exercise of power conferred on him by the provisions of the Control Order (except paragraphs 8 and 9) could be appealed against before the State Government; likewise, an appeal would lie before the District Magistrate or the Deputy Commissioner in case of a situation covered by clause (ii) of sub-paragraph (b) of paragraph 10. I would have no hesitation in accepting Mr. Saha Roy's contention if paragraph 10 were not amended w.e.f. November 25, 2003.

18. One other significant effect of the amendment, which is noticeable, seems to be that an order passed by the Director under any provision other than paragraphs 8 and 9 is not open to appeal before any authority. It is well-known that an appeal is the creature of the statute and since no appeal has been provided for in the Control Order against orders passed by the Director under paragraphs 7, 11, 12, 13 and 15, the same are not appealable whereas orders passed under the said provisions by the District Magistrate would, w.e.f. November 25, 2003, be appealable before the State Government. One need not examine the policy behind such incongruity because that is not the question that arises for determination here. It is for the appropriate authority to apply its mind and to consider incorporation of requisite provisions so that an original order passed by the Director under provisions other than paragraphs 8 and 9, which is based on findings of fact, could at least be carried in appeal for the purposes for which appellate power is exercised.

19. However there can be no two opinions that in view of the amendment effected in paragraph 10 by the notification dated November 25, 2003, the provisions of the Control Order cannot be read in a manner so as to hold that the power and authority exercisable by the Director to cancel a licence is confined to the areas within Calcutta as defined in paragraph 3(b). The licensing authority in respect of an agent in West Bengal is the Director in terms of the provisions of paragraph 5 of the Control Order. An authority having the power to issue a licence must be regarded as having the power to revoke/withdraw/cancel viewed in the light of the said provision unless a contrary intention clearly appears. It would not thus be proper to hold that although the Director has the power to grant licence, he has no power to cancel it. True it is, that the "District Magistrate having jurisdiction" over a particular district does not have the power and authority to grant a licence to an agent but is vested with the power and authority to cancel a licence granted by the Director in view of paragraph 9 of the Control Order, but the jurisdiction that is exercisable in terms of paragraph 9 must be confined to the concerned district in respect whereof the incumbent holds office as District Magistrate. The words "having jurisdiction" appearing in paragraph 9 are neither to be construed as delineating the jurisdiction of the Director as well as the District Magistrate, nor are such words to be read after

the word "Director". The said words are referable only to the District Magistrate for indicating the area in respect whereof he has jurisdiction. It could have been the intent of the pre-amended paragraph 10 of the Control Order that the Director would exercise powers of cancellation or suspension only in respect of the area within Calcutta but with the coming into force of such amendment w.e.f. November 25, 2003, the area of jurisdiction of the Director has been enlarged to cover the entire State of West Bengal and it appears, in my considered view, to be the intent to confer concurrent powers on the Director as well as the District Magistrate having jurisdiction over a particular district to cancel or suspend the licence issued in favour of an agent of S.K. Oil on detection of malpractice or contravention of any of the provisions of the Control Order or the conditions of licence or direction given under paragraph 12.

20. Importantly, the main provision of paragraph 15 of the Control Order conferring powers for entry, search, seizure, etc. has not been amended. The Director or the District Magistrate or any officer not below the rank of Sub-Inspector of Food and Supplies in the Department of Food and Supplies may exercise such powers. In addition, a Sub-Inspector of Police as may be authorized by in writing in this behalf by the Director in Calcutta or the District Magistrate elsewhere may carry out search, seizure, etc. upon entering the premises of an agent or dealer. Power of the Director to enter any premises of an agent in West Bengal for search and seizure of stock upon recording satisfaction of the nature mentioned in paragraph 15 has not been curtailed in any manner. Majorly, such search and seizure may form the ground for initiation of action under paragraph 9. It is only the authorisation of a Sub-Inspector of Police to carry on search and seizure in Calcutta that is to be granted by the Director. The Director is not empowered to authorize a Sub-Inspector of Police in the district to enter any premises for search and seizure. That is left to be done by the District Magistrate having jurisdiction over a district, should he choose not to exercise the power to enter for the purpose of search and seizure of stock himself. If indeed the power of cancellation or suspension of licence by the Director was intended to be restricted only in Calcutta, neither would have paragraph 10 been amended nor paragraph 9 left un-amended with like provision as in paragraph 15.

21. It is necessary at this stage to examine the decisions of the Division Benches in M/s. Lachmi Narayan Bhomraj (supra) and Ranjit Kumar Murmu (supra) cited by Mr. Saha Roy to assess its materiality to the issue at hand.

22. Ranjit Kumar Murmu filed W.P. 899 of 2009, which was disposed of by a learned judge on September 4, 2009 with a direction on the Joint Director of Consumer Goods, West Bengal to give personal hearing to the concerned parties and to take a reasoned decision in respect of allocation of kerosene oil. The Division Bench while hearing the writ appeal filed by M/s. Lachmi Narayan Bhomraj (APOT 367 of 2009) disposed it of by its order dated September 16, 2009 by merely substituting the authority who was to consider and decide the matter in terms of the order under appeal dated September 4, 2009; instead of

the Joint Director, the District Magistrate, Purulia was directed to comply with the order of the learned judge being the authority under paragraph 11 of the Control Order. The order dated September 16, 2009 in M/s. Lachmi Narayan Bhomraj (supra), in my humble view, does not lay down any law which could operate as a binding precedent.

23. In compliance with the order dated September 16, 2009, the District Magistrate, Purulia passed an order dated December 12, 2009 under paragraph 11 of the Control Order. Feeling aggrieved thereby, Ranjit Kumar Murmu preferred an appeal before the Principal Secretary to the Government of West Bengal, Food and Supplies Department. An order dated March 8, 2010 was passed by him reversing and/or setting aside the order of the District Magistrate, Purulia dated December 12, 2009 by assuming jurisdiction as an appellate authority under paragraph 10 of the Control Order. The said order of the Principal Secretary was under challenge in the writ petition out of which the writ appeal (APOT 237 of 2010) arose. Since the District Magistrate had neither exercised power under paragraph 8 nor paragraph 9 of the Control Order, a learned judge of this Court allowed the writ petition holding that the appeal before the Principal Secretary was not competent and, therefore, exercise of jurisdiction was not called for. The order of the learned judge was upheld by the Division Bench and, consequently, the writ appeal stood dismissed. The Division Bench was of the view that since the order of the District Magistrate related to allocation of kerosene oil, the same was covered by paragraph 11 of the Control Order and since the Control Order did not provide any appeal against an order passed under paragraph 11 (an appeal being provided only against an order passed under paragraph 8 or 9), the learned judge was right in setting aside the order of the Principal Secretary.

24. The judgment and order of the Division Bench was questioned before the Supreme Court. By its judgment and order dated April 15, 2013, the SLP was dismissed.

25. It appears that the Division Bench as well as the Supreme Court while hearing the writ appeal and the SLP respectively considered the provision in paragraph 10 of the Control Order prior to its amendment w.e.f. November 25, 2003, although the first date available from the judgment of the Division Bench on which an application for grant of licence was made is March 6, 2006. In my humble understanding of the provisions of the Control Order as it stands today, an order under paragraph 11 of the Control Order could be carried in appeal before the State Government in terms of provisions contained in clause (i) of subparagraph (b), paragraph 10 of the Control Order. However, viewed in the light of pre-amended paragraph 10, an order under paragraph 11 was not an appealable order. Since the decisions of the Division Bench and the Supreme Court are not in respect of interpretation of the amended provision of paragraph 10 of the Control Order, the same do not have any application here.

26. For the reasons aforesaid, the first contention must fail and is overruled.

27. In support of the second contention that the proceedings were not completed within 30 days and, therefore, the proceedings stood lapsed, a decision of a Division Bench of this Court dated October 7, 1996 in FMAT 3157 of 1996 (Krishnanath Sen v. State of West Bengal and ors.) was relied on by Mr. Saha Roy.

28. The period of 30 days mentioned in the proviso to paragraph 9 of the Control Order within which an order is required to be passed cannot be held to be mandatory, since the provision itself does not lay down any consequence should no order be passed within such period. The decision reported in Md. Yeasin and Others Vs. State of West Bengal and Others,) rendered by another Division Bench of this Court may be referred to in this regard. It was a writ appeal that was being considered. The writ petition arose out of the West Bengal Public Distribution System (Maintenance and Control) Order, 2003. It was held there, upon consideration of various authorities on the point, by Hon'ble Asok Kumar Ganguly, J. (as His Lordship then was) that the period of three months from date of service of notice seeking explanation, within which departmental proceedings drawn against a dealer were to be completed (appearing in paragraph 21), was not mandatory. One may also refer to the decision of the Supreme Court reported in Sharif-ud-din Vs. Abdul Gani Lone, wherein it was held that whenever a statute prescribes a particular act to be done in a particular manner and also lays down the specific consequence that would follow a failure to comply with the requirement, such a provision should be construed as mandatory if the consequences are mentioned. There are also other decisions of the Supreme Court on the point, which require to be noticed. In the decisions reported in Balwant Singh and Others Vs. Anand Kumar Sharma and Others, and Visitor and Others Vs. K.S. Misra, it has been laid down that when a public functionary is required to discharge its public functions within a time-frame, the same would be construed to be directory in nature, unless the consequences therefor are specified. Much the same view has been taken in the decision reported in Commnr. of Customs (Imports), Mumbai Vs. Tullow India Operations Ltd., . In view of such authoritative pronouncements, the decision dated October 7, 1996 in Krishnanath Sen (supra) must be held to have been overruled.

29. I have, therefore, no hesitation to hold that the contention is not at all sound.

30. The third point that copy of the enquiry report of the District Controller was not furnished to the petitioner, is not a point that was raised in the memorandum of appeal that was presented before the appellate authority. The petitioner has taken the point for the first time before this Court. Be that as it may, it appears that along with the order of suspension-cum-show cause dated January 9, 2009, copy of the report of the District Controller dated November 19, 2008 was sought to be furnished to the petitioner. From the minutes of hearing that was extended to the petitioner on January 28, 2009, it also does not appear that any grievance was raised with regard to non-furnishing of copy of the report. The plea of the petitioner on this score cannot, thus, be entertained.

31. The final ground of challenge is equally without merit. I have perused the order of the appellate authority. The appellate authority considered the points which were raised in the appeal and gave a reasoned decision. It is not as if the order of the appellate authority does not reflect application of mind. For the reasons aforesaid, I find no reason to interfere. The writ petition stands dismissed, without costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.