(2015) 04 CAL CK 0053

In the Calcutta High Court

Case No : W.Ps. 27681, 28290, 29922, 29924, 30025, 30037, 31222, 31223, 32437, 32773, 32840 and 33276 (W) of 2014 and 1667 (W) of 2015

Gurupada Pramanik and Others APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:
Constitution of India, 1950 — Article 14, 31B, 62(1)
Essential Commodities Act, 1955 — Section 2, 3, 5
General Clauses Act, 1897 — Section 21

Citation : (2015) 3 CALLT 313

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Debabrata Saha Roy and Pingal Bhattacharya, for the Appellant; Kalyan Kumar Bandopadhyay, Kishore Dutta, Sushovan Sengupta, Tarak Karan and Sirsanya Bandopadhyay, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Debasish Kar Gupta, J.—These writ applications are filed challenging the Government orders issued under memo Nos. 1706-FS/Sectt./Food/4P-09/2012 (Pt-II) dated July 21, 2014 and 1707-FS/Sectt./Food/4P-9/2012 (Pt.-II) dated July 21, 2014, respectively.

2. The aforesaid first Government order No. 1706-FS/Sectt./Food/4P-09/2012 (Pt-II) dated July 21, 2014 (hereinafter referred to as the impugned first Government order) is issued by the Government of West Bengal in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the said Act, 1955) in cancellation of all previous orders and circulars on the subject providing for guidelines in respect of working capital/financial capacity of applicants at the time of filing applications in connection with filling up of vacancies of dealers/distributors, as the case may be, under the provisions of paragraph 20 or paragraph 26 of the West Bengal Public Distribution System (Maintenance and Control) Order 2013.

3. The aforesaid second Government order No. 1707-FS/Sectt./Food/4P-9/2012 (Pt.-II) dated July 21, 2014 (hereinafter referred to as the impugned second Government order) is issued by the Government of West Bengal in exercise of powers conferred by Section 3 of the said Act, 1955 for making guidelines to be followed in respect of specification of godowns while inviting applications for new licences as also in case of renewal of licences of "Fair Price Shops and Distributors" (hereinafter referred to as FPS and Distributors), as the case may be.

4. The impugned first and second Government orders are issued while the applications of the writ petitioners for engagement as dealer or distributor, as the case may be, have been pending where inquiries are under process or already complete but approvals are yet to be obtained from the Government of West Bengal. The writ petitioners are directed to furnish fresh/revised documents before the respondent authorities after fulfillment of the conditions mentioned in the impugned first and second Government orders in respect of financial solvency and capacity of godowns for the purpose of further consideration of their applications.

5. It is submitted by Mr. Debabrata Saha Roy, learned advocate appearing on behalf of the petitioner in W.P. No. 30025 (W) 2014 that the guidelines prescribed in the impugned first and second orders run counter to the following provisions of law:-

(i) Section 3 of the said Act, 1955 empowers the Central Government to issue Government orders for regulating or prohibiting production, supply and distribution of any essential commodity in the event the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of that commodity or for securing its equitable distribution and availability at fair price.

(ii) Section 5 of the said Act, 1955 empowers the Central Government to delegate, by notified order, power to make orders or issue notifications under Section 3 of the said Act, 1955, to such officer or authority subordinate to the Central Government or such State Government or such officer or authority subordinate to a State, in relation to such matters and subject to such conditions, if any, as may be specified in the direction.

(iii) In exercise of powers conferred by Section 3 of the said Act, 1955, Public Distribution System (Control) Order, 2001 (hereinafter referred to as the said Control Order, 2001), has been issued by the Central Government under the provisions of paragraph 7 read with Clause 5 of annexe to the said Control Order, 2001, the State Governments are authorised to issue control orders under Section 3 of the said Act, 1955 for regulating the sale and distribution of essential commodities. Licences of dealers/FPS/distributors, as the case may be, are issued under the above control order by the designated authority appointed by the State Government.

(iv) The West Bengal Public Distribution System (Maintenance and Control) Order, 2013 (hereinafter referred to as the said Control Order, 2013) is framed by the Government of West Bengal in exercise of the power delegated to the Government under paragraph 7 read with Clause 5 of annexe to the said Control Order, 2001.

6. According to him, the impugned first and second Government orders have not been issued adhering to the provisions of law as observed hereinabove. Therefore, the impugned first and second orders have been issued without jurisdiction.

7. According to Mr. Saha Roy, the applications of the petitioners are submitted in response to the advertisements published by the competent authorities of the Government of West Bengal fulfilling the following eligibility criteria:-

"Eligibility criteria:-

(1) The applicant must be adult Indian Citizen.

(2) If the applicant be individual(s), he/she/they should be permanent resident of the Sub-division where the vacancy occurs.

(3) The applicant should have knowledge for both reading and writing of local language prevailing in the area for which the vacancy stands for.

(4) He/she should possess a suitable shop-cum-godown space comprising, a floor space of at least 200 Square feet of his/her own or to be taken by him/her on rent at the site where the vacancy exists.

(5) There has to be adequate space for loading and unloading of stocks as well as for queuing of the rationees under a suitable shade.

(6) The applicant must be able to make a financial arrangement of Rs. 50,000/- at least to purchase indented commodities in order to run the Fair Price Shop properly and efficiently.

(7) The applicant must be prepared to furnish on engagement, a security deposit of Rs. 25,000/- (Rupees twenty five thousand only) and licence fee of Rs. 10,000/- (Rupees ten thousand only) in Treasury Challan under appropriate head of account.

(8) The applicant (in case of individuals) should not be employed in any Govt./ Semi-Govt. organization/School etc. and should not be an elected member of any Panchayeti Raj Institution/Urban local body.

(9) The applicant should not possess any Fair Price Shop either in his/her name or in the name of any member of his/her family. Also he/she should not be connected with any distributor or wholesaler or dealer duly licensed by this department in the form of a partner or promoter.

(10) The applicant must not be convicted in any court of law/implicated in any

criminal case.

8. The applicant must fulfil the above eligibility criteria.

The applicant must submit, along with application in Form-C, the supporting documents as follows:-

1) Recent passport size colour photograph (to be self-attested and affixed on the application form).

2) Affidavit as per Annexure-1 to Form-C under WBPDS(M&C) Order, 2013.

3) Proof of Citizenship (photocopy of EPIC/AADHAR Card/PAN Card/Passport).

4) Proof of residence.

5) Proof of Educational Qualification.

6) Proof of unemployment by means of self declaration in plain paper/ Employment Bank Card.

7) Document regarding possessional right over the proposed place of business (Photocopy of deed/ROR/Registered rent/lease agreement at least for 10 years/ rent receipt etc.)

8) Document regarding character of the land.

9) Proof of financial solvency (Account statement/photocopy of updated passbook issued by a recognized bank).

10) A layout map of the offered godown indicating space for loading/unloading and approach road.

11) Photocopy of Registration certificate issued by the competent authority (in case of SHG/Co.Op. Society."

9. It is further submitted by Mr. Saha Roy that the action of the respondent authority to direct the petitioners to furnish fresh/revised documents fulfilling the conditions in respect of financial solvency and specification of storage godowns as laid down in the impugned first and second control order, which have not been existing at the material point of time of submitting the applications by the petitioner, cannot be sustained in law. In other words retrospective effect cannot be given to the impugned first and second control orders, in absence of any provision in the said Act, 1955 read with the relevant control orders, as observed hereinabove.

10. Reliance is place by Mr. Saha Roy on the decisions of Katikara Chintamani Dora and Others Vs. Guntreddi Annamanaidu and Others, AIR 1974 SC 1069 : (1974) 1 SCC 567 : (1974) 2 SCR 655 , P. Mahendran and others Vs. State of Karnataka and others, AIR 1990 SC 405 : (1990) 60 FLR 103 : (1990) 1 SCC 411 : (1989) 2 SCR 385 Supp , State of Rajasthan and Others Vs. Basant Agrotech (India) Ltd., (2014) 1 AD 127 : AIR 2014 SC 487 : (2014) 302 ELT 3 :

(2013) 15 JT 388 : (2013) 15 SCALE 1 : (2014) 1 SCJ 476 , Public Service Commission, Uttaranchal Vs. Jagdish Chandra Singh Bora and Another Etc., (2014) AIRSCW 1804 : (2014) 3 JT 566 : (2014) 3 LLJ 502 : (2014) 3 SCALE 380 : (2014) 8 SCC 644 and District Inspector of Schools (SE) and Others Vs. Abhijit Baidya and Others etc. etc., (2013) 3 CHN 711 .

11. It is submitted by Mr. Amal Baran Chatterjee, learned Senior Advocate, appearing on behalf of the petitioners in W.P. No. 29922 (W) of 2014 and W.P. No. 29924 (W) of 2014, that the provision of said Act, 1955, read with said Control Order, 2001 framed by the Central Government as also the said Control Order, 2013 framed by the Government of West Bengal contained procedure for issuing licences of dealers, FPS and distributors. Applications are submitted by the petitioners in response to the advertisements published by respondent authorities. Those advertisements contained eligibility criteria. The applications must be considered in the light of the above criteria. According to Mr. Chatterjee, changing the above criteria pending consideration of the application of petitioners is violative of the principles of fair play guaranteed under the provisions of Article 14 of the Constitution of India. It is further submitted by Mr. Chatterjee that the advertisements inviting applications from eligible candidates for granting licences under reference do not contain any provision for changing the eligibility criteria. Therefore, according to him, the action of the respondent authorities to consider the applications of the petitioners in the yardstick of the impugned first and second Government orders cannot be sustained in law.

12. Mr. Chatterjee relied on the decision of Bedanga Talukdar Vs. Saifudaullah Khan and Others, (2011) 11 SCALE 293 .

13. It is submitted by Mr. Sridhar Chandra Bagari, learned Advocate appearing on behalf of the petitioners in W.P. No. 31222 (W) of 2014 and W.P. No. 31223 (W) of 2014 that the impugned first and second Government Orders are also made applicable while processing vacancies for which inquiries may be ongoing or complete but have not been approved by the Department for engagements or issuing licences as a matter of policy. But the condition of the impugned first Government order for maintaining bank balance of Rs. 5 lakh by an applicant as working capital as reflected on not only the day of application but also one year preceding the date of application is a condition which cannot be fulfilled by intending applicants, in spite of having capacity and intention to fulfil the above condition. Therefore, the policy of the Government of West Bengal to give opportunity to those applicants in respect of whose applications inquiries are ongoing or complete but not approved by the Department for engagements or issuing licences would be frustrated.

14. It is submitted by Mr. Kalyan Kr. Bandopadhyay, appearing on behalf of the State respondents that the directions contained in the impugned first and second Government orders are "Orders" within the meaning of sub-Section (cc) of Section 2 of the said Act, 1955. According to him, the right of the State to give such direction emanates from the provisions of Sections 3 and 5 of the said Act,

1955. According to him, the powers conferring right to issue orders under Clauses (d) and (e) of sub-Section (2) of Section 3 of the said Act, 1955, was delegated in favour of the State Government by order No. S.O. 681 (E) dated November 30, 1974. According to him, it is followed by the said Control Order, 2001.

15. According to Mr. Bandopadhyay, the said Control Order, 2001 is in nature of guidelines delegating power to the State Governments to frame control orders under paragraph 5 of the same. According to him, since the above power has been delegated to the State Government for the purpose mentioned hereinabove, further delegation is not necessary to issue orders as defined in sub-Section (cc) of Section 2 of the said Act, 1955.

16. It is also submitted by Mr. Bandopadhyay that according to the provisions of Section 21 of the General Clauses Act, 1897 whereby any Central Act or Regulation a power to issue notifications, orders, rules or bye-laws is conferred, that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

17. It is further submitted on behalf of the State respondents that the impugned first and second Government orders purport their applicability in respect of pending applications under reference. He further added that the right of any of the petitioners for getting licences or for engagement as dealer has not yet been crystallized. Therefore, the provisions of the impugned Government orders are applicable at the time of consideration of the aforesaid applications. According to him, no vested right has yet been created in favour of the petitioners for appointing them as Dealers under the provisions of the said Act, 1955 read with those of the control orders prevailing at the time of submitting those applications.

18. With regard to alleged violation of the provisions of Article 14 of the Constitution of India, it is submitted by him that the power of the legislature to amend, delegate or obliterate a statute or to enact a statute giving prospective effect or retrospective effect cannot be questioned on the alleged ground of violation of fundamental right.

19. With regard to the applicability of the impugned second Government order, in case of renewal of licences of the existing dealers/distributors, as the case may be, it is submitted on behalf of the State respondents that the licences are issued to those dealers/distributors, as the case may be, subject to renewal of the same each and every year. Therefore, the impugned second Government order is applicable in case of renewal of licences of the existing dealers and distributors also.

20. The State respondents relied upon the decisions of State of Mysore and Another Vs. P. Narasing Rao, AIR 1968 SC 349 : (1968) 17 FLR 179 : (1968) LabIC 360 : (1968) 2 LLJ 120 : (1968) 1 SCR 407 , D.S. Nakara and Others Vs. Union of India (UOI), AIR 1983 SC 130 : (1983) 1 LLJ 104 : (1982) 2 SCALE

1213 : (1983) 1 SCC 305 : (1983) 2 SCR 165 : (1983) 1 SLJ 131 , Anvaruddin and others Vs. Shakoor and others, AIR 1990 SC 1242 : (1990) CriLJ 1269 : (1990) 2 Crimes 158 : (1990) 2 JT 83 : (1990) 1 SCALE 636 : (1990) 3 SCC 266 : (1990) 2 UJ 365 , Shankarsan Dash Vs. Union of India, AIR 1991 SC 1612 : (1991) 62 FLR 981 : (1991) 2 JT 380 : (1991) LabIC 1460 : (1992) 2 LLJ 18 : (1991) 1 SCALE 848 : (1991) 3 SCC 47 : (1991) 2 SCR 567 : (1991) 2 UJ 212 , State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd., (1996) 8 AD 473 : AIR 1997 SC 1815 : (1996) 10 JT 116 : (1996) 8 SCALE 71 : (1997) 1 SCC 326 : (1996) 8 SCR 193 Supp : (1997) AIRSCW 1188 , A.P. Dairy Development Corporation Federation Vs. B. Narasimha Reddy and Others, (2011) 10 JT 145 : (2011) 9 SCALE 688 : (2011) AIRSCW 4995 and N.K. Bajpai Vs. Union of India (UOI) and Another, AIR 2012 SC 1310 : (2012) 2 CTC 449 : (2012) 190 ECR 159 : (2012) 3 RCR(Civil) 459 : (2012) 3 SCALE 452 : (2012) 4 SCC 653 : (2012) AIRSCW 1974 : (2012) 2 Supreme 417 , in support of the above submissions.

21. I have heard the learned Advocates appearing on behalf of the respective parties and I have given my thoughtful considerations to the facts and circumstances involved in these writ applications.

22. A common issued involved in these writ applications is applicability of the first impugned order and the second impugned order at the time of consideration of applications of the petitioners for engagement as Dealers under the provisions of paragraph 20 of the said Control Order, 2013.

23. The first impugned order is issued in exercise of the powers conferred under Section 3 of the said Act, 1955 and in cancellation of all previous orders and circulars relating to working capital/financial capacity of the applicants. The first impugned order is quoted below:-

"Government of West Bengal Food and Supplies Department 11/A, Mirza Ghalib Street, Kolkata-700087

No. 1706-FS/Sectt./Food/4P-09/2012 (Pt.II)

Date:21.07.2014

ORDER

Consequent upon issue of West Bengal Public Distribution System (M and C) Order, 2013, while determining the eligibility of an applicant for engagement as a Dealer/Distributor, it has become necessary and expedient to adopt a suitable guideline in respect of working capital/financial capacity of the applicants required for smooth running of FPS/Distributorship in the State.

Now, therefore, in exercise of the powers conferred under Section 3 of the EC Act, 1955 and in cancellation of all previous orders and circulars on this subject, the Governor is pleased hereby to make the following guideline, inter alia, in respect of working capital/financial capacity at the time of filing application for engagement as Dealer/Distributor under Section (20)/under Section (26) of the West Bengal Public Distribution System (M and C) Order, 2013.

1. Application for Dealership must have bank balance of Rs. 5.0 lakh as working capital as reflected on the day of application and one year preceding the date of application.

2. Application for Distributorship must have bank balance of at least Rs. 50.0 lakh as working capital as reflected on the day of application and one year preceding the date of application.

This Order shall also be applicable while processing vacancies for which inquiries may be ongoing or complete but have not been approved by the Department for engagement or issue of licence.

ANIL VERMA, IAS Principal Secretary to the Government of West Bengal & Commissioner, Food."

24. The second impugned order is also issued in exercise of powers conferred by Section 3 of the said Act, 1955 adopting a uniform policy in respect of specification of storage godowns both for Fair Price Shops and Distributors. The second impugned order is quoted below:-

"Government of West Bengal Food and Supplies Department 11A, Mirza Ghalib Street, Kolkata-700087

No. 1707-FS/Sectt./Food/4P-9/2012 (Pt.II)

Date: 21.07.2014

ORDER

In view of coming into force of the West Bengal Public Distribution System (M and C) Order, 2013 and its subsequent amendment vide No. 1284-FS/Sectt/Food/4P-09/2012 dated 06.06.2014 published in the Kolkata Gazette and in keeping with various reforms undertaken by the Department for safe and scientific storage of food grains to be utilised under PDS it has become necessary and expedient to adopt a uniform policy in respect of specification of storage godwons both for FPS and Distributors.

Now, therefore, in exercise of the powers conferred by Section 3 of the EC Act, 1955 the Governor is pleased hereby to make the following guidelines to be followed while inviting applications for new licences and in case of renewal of licences. The existing dealers/distributors shall also upgrade their godowns accordingly within 6 (six) months from the date of issue of this order.

F.P.S. (Fair Price Shop)

1. The size of the godown should be minimum 400 sq. ft. along with a covered space of 200 sq. ft. adjacent to the godown to be used for office purpose and for FPS automation.

2. There must be a shade in front of the shop to accommodate at least 20 people who may wait in the queue in consonant with point 23 NB-1 of ''Form-C'' of the W.B.P.D.S. (M&C) Order, 2013.

3. The Godown must be a well-ventilated pucca structure with concrete floor.

Distributor

1. The size of the godown should be to accommodate at least 1000 MT of food grains along with a space of 25% for provision of alleys in between the stacks of different commodities with view to keeping the stock of each commodity separately and neatly arranged for easy identification. There must be a covered space of 200 sq. ft. adjacent to the godown to be used for office purpose as well as for computer operations.

2. The minimum height of the godown should be 15 feet high.

3. The Godown must be a well-ventilated pucca structure with concrete floor.

4. Equivalent Insurance coverage should be there to cover the loss of food grains due to any natural or manmade disaster.

This order shall also be applicable while processing vacancies for which inquiries may be ongoing or complete but have not been approved by the Department for engagement or issue of licences.

ANIL VERMA, IAS Principal Secretary to the Government of West Bengal & Commissioner, Food."

(A) Jurisdiction of the Government of West Bengal to issue the impugned orders:

25. For examining the validity of the impugned orders, the relevant provisions of sub-Sections (1) and (2) of Section 3 of the said Act, 1955 are quoted below:-

"3. Powers to control production, supply, distribution, etc., of essential commodities. - (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibition the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide-

(a)....

(b)....

(c)....

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f)....

(g)....

(h)....

(i)....

(j)...."

26. The issue involved in these writ applications is not concerned with the other provisions of Section 3 of the said Act, 1955.

27. The character of a statute or order made in exercise of the powers conferred by the above provisions of sub-Sections (1) and (2) of Section 3 of the said Act, 1955, can be ascertained by the terms of such statute or order. When such statute or order lays down a general rule applicable to all persons or objects or transaction of a particular kind or class, it is legislative in character. Or in other words it is not made for discharging quasi-judicial function for specified purposes or cases, provided it is confined to the limits within which it can operate. The scope of power conferred depends on the terms of empowering provisions. The above proposition of law has been settled by a Bench of seven Hon''ble Judges of the Supreme Court in the matter of Prag Ice and Oil Mills and Another Vs. Union of India (UOI), AIR 1978 SC 1296 : (1978) CriLJ 1281(1) : (1978) 3 SCC 459 : (1978) 3 SCR 293 and the relevant portions of the above decision are quoted below:-

"37. We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character in the type of control order which is now before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. it is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class. In the case before us, the Control Order applies to sales of mustard oil anywhere in India by any dealer. Its validity does not depend on the observance of any procedure to be complied with or particular to types of evidence to be taken on any specified matters as conditions precedent to its validity. The test of validity is constituted by the nexus shown between the order passed and the purposes for which it can be passed, or, in others words by reasonableness judged by possible or probable consequences.

38. It is true that even executive or legislative action must be confined to the limits within which it can operate. It must fall reasonably within the scope of the

powers conferred. The scope of the powers conferred depends upon the terms of the empowering provision. As we have already mentioned, the empowering provision in the instant case is widely worded. The validity of Section 3 has not been challenged before us. As indicated above, it could not be challenged by reason of Article 31B after its inclusion in the Ninth Schedule of the Constitution. The result necessarily is that, in a case in which the Central Government is the judge of expediency and necessity to the extent that even the protection of guaranteed fundamental rights cannot stand in the way of its view or opinion of such necessity and expediency, a challenge on the grounds on which it was attempted before us could not succeed."

(Emphasis supplied)

28. The above proposition of law has been laid down by the Hon''ble Supreme Court while examining the validity of an order issued by the Government of India fixing retail price of mustered oil, an essential commodity under the provision of the said Act, 1955, applicable anywhere in India in respect of any dealer for the reason that the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing the supply of the above essential commodity or for securing its equitable distribution and availability at fair price.

29. The first impugned Government order is issued by the Government of West Bengal determining the eligibility of an applicant for engagement of Dealer/ Distributor which has become necessary and expedient to adopt guideline in respect of working capital/financial capacity of all the applicants required for smooth running of FPS/Distributorship in the State of West Bengal.

30. Similarly, the second impugned Government order is issued for scientific storage of food grains, the essential commodities under the said Act, 1955, which has become necessary and expedient to adopt a uniform policy in respect of specification of storage godowns both for all FPS and Distributors in the State of West Bengal.

31. Therefore, the law laid down by the Hon''ble Supreme Court in the matter of M/s. Prag Ice and Oil Mills (Supra) is applicable in respect of the impugned Government orders since those are legislative in nature on the basis of observations made hereinabove and those are valid in the eye of law provided those orders are confined to their limits of powers conferred in terms of empowering provisions of law.

32. For examining the propriety of delegation of power upon the State of West Bengal, the provisions of Section 5 of the said Act, 1955, are required to taken into consideration. The above provisions are quoted below:-

"5. Delegation of powers. - The Central Government may, by notified order, direct that the power to make orders or issue notifications under section 3, shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by-

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government, as may be specified in the direction."

33. For considering the delegation of power upon the Government of West Bengal by virtue of Clause 5 of annexe to paragraph 7 of the said Control Order, 2001, amongst others, the above provision is quoted below:-

"5. Licensing. - The State Governments shall issue an order under section 3 of the Act for regulating the sale and distribution of the essential commodities. The licences to the fair price shop owners shall be issued under the said order by the designated authority appointed by the State Government and the authority shall lay down the duties and responsibilities of the fair price shop owner. The responsibilities and duties of fair price shop owners shall include, inter alia,

(i) sale of essential commodities as per the entitlement of ration card holders at the retail issue prices fixed by the concerned State Government under the Public Distribution System''

(ii) display of information on a notice at a prominent place in the shop on daily basis regarding (a) list of BPL and Antodaya beneficiaries, (b) entitlement of essential commodities, (c) scale of issue, (d) retail issue prices, (e) timings of opening and closing of the fair price shops, (f) stock of essential commodities received during the month, (g) opening and closing stock of essential commodities, and (h) the authority for redressal of grievances/lodging complaints with respect to quality and quantity of essential commodities under the Public Distribution System;

(iii) maintenance of records of ration card holders (APL, BPL and Antyodaya), stock register, issue or sale register;

(iv) furnishing of copies of specified documents, namely, ration card register, stock register, sale register to the office of the Gram Panchayat or Nagar Palika or Vigilance Committee or any other body authorized by State Governments for the purpose;

(v) display of samples of foodgrains being supplied through the fair price shops;

(vi) production of books and records relating to the allotment and distribution of essential commodities to the inspecting agency and furnishing of such information as may be called for by the designated authority;

(vii) accounting of the actual distribution of essential commodities and the balance stock at the end of the month to the designated authority of the concerned State Government with a copy to the Gram Panchayat;

(viii) opening and closing of the fair price shop as per the prescribed timings displayed on the notice board.

1. Substituted by G.S.R. 392(E), dated 29.06.2004 (w.e.f. 29.06.2004)."

34. Upon consideration of the above provisions, I am of the opinion that powers delegated to the Government of West Bengal by the said Control Order, 2001, includes the power, amongst others, to issue the first impugned Government order under Section 3 of the said Act, 1955, in respect of working capital/ financial capacity of the applicants for smooth running of FPS/Distributorship in the State of West Bengal.

35. Similarly, powers delegated to the Government of West Bengal by virtue of the said Control Order, 2001, includes the power, amongst others, to issue the second impugned Government order under the provision of Section 3 of the said Act, 1955, for scientific storage of foodgrains, which has become necessary and expedient to adopt a uniform policy both for FPS and Distributors in the State of West Bengal.

36. Further, this Court is of the opinion that the impugned Government orders are issued for the purpose of supplementing the said Control Order, 2013 and not to supplant any of the provisions of the above control order.

37. In accordance with the provisions of Section 21 of the General Clauses Act, 1897 whereby any Central Act or Regulations a power to issue notifications, order, Rules or bye-laws is concerned, that power includes the power exercisable in the like manner and subject to the like sanction and conditions, if any, to add to, amend, vary or rescind any notification, orders, rules or bye-laws as issued. The aforesaid provision is quoted below:

"Section 21. Power to Issue to Include Power to Add to, Amend, Vary or Rescind Notifications, Orders, Rules or Bye-laws - Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

38. After taking into consideration the provisions of Clause 5 of annexe to paragraph 7 of the said Control Order, 2001, in the light of the aforesaid provisions of Section 21 of the General Clauses Act, 1897, I am of the opinion Government of West Bengal is empowered to issue the impugned Government order in cancellation of all previous orders and circulars on this subject.

39. Needless to point out that once the terms of empowering provisions are traceable in favour of the Government of West Bengal in the said Control Order, 2001, the impugned Government orders are sustainable in law, so far as the jurisdiction of the Government of West Bengal is concerned, notwithstanding mentioning of the said Control Order, 2001, therein.

(B) Applicability of the impugned orders on the applications submitted by the petitioners for engagement as dealers under the said Control Order, 2013:

40. In view of the provisions of sub-Section (1) of Section 3 of the said Act, 1955 an application for granting or renewal of a licence has to be considered in the

light of the conditions mentioned in the said Act, 1955 or any rule framed thereunder. In accordance with the provisions of the said Act, 1955, a licence could only be issued in favour of an applicant subject to fulfillment of prescribed eligibility requirements by that applicant or in other words there can be no immediate or automatic creation of a right in favour of an applicant to get licence or renewal of the same consequent upon filing of an application. The vested right in favour of an applicant in the aforesaid case is created on the date of granting or renewal of such licence upon fulfillment of the criteria prescribed for granting or renewal of such licence. Reference may be made to the decision of Union of India (UOI) Vs. R. Padmanabhan, (2003) 156 ELT 625 : (2003) 7 JT 196 : (2003) 6 SCALE 393 : (2003) 7 SCC 270 : (2003) 2 SCR 432 Supp and the relevant portions of the above decision are quoted below:-

"8. The decision of the Division Bench rendered in affirmance of the one rendered by the Single Bench suffers from a serious infirmity in not adverting properly to the basics and fundamentals of the Scheme for Rewards and in assuming to the contra that when an informer could be given liberally, the government servant also must be shown the same consideration, whereas a careful scanning-through may go to show that an informant is placed on a different pedestal than a government servant. The rewards are also to be an can be "up to 20%" or as the case may be and not that invariably it must be as a rule 20% of the estimated market value. Reward is purely an ex gratia payment, subject to the Guidelines on the discretion of the competent authority, though it cannot arbitrarily be denied or refused at whim or fancy and it should specifically conform with and must be shown to fall or be claimed within the four corners of the Scheme and not by any deviation or modulation of the Scheme, as the courts think it should be and if it cannot come strictly within the four corners of it, such claim may have to be dealt with only under the residuary powers enabling the grant of reward. That apart, being ex gratia, no right accrues to any sum as such till it is determined and awarded and, in such cases, normally t should not only be in terms of the Guidelines and policy in force, as on the date of consideration and actual grant but has to be necessarily with reference to any indications contained in this regard in the Scheme itself. The line of decisions in relation to vested rights accrued being protected from any subsequent amendments may not be relevant for such a situation and it would be apposite to advert to the decision of this Court reported in State of T.N. v. Hind Stone. That was a case wherein this Court had to consider the claims of lessees for renewal of their leases or for grant of fresh leases under the Tamil Nadu Minor Mineral Concession Rules, 1959. The High Court was of the view that it was not open to the State Government to keep the applications filed for lease or renewal for a long time and then dispose them of on the basis of a rule which had come into force later. This Court, while reversing such a view taken by the High Court, held that in the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application, despite the delay, if any, involved although it is desirable to dispose of the applications, expeditiously. Therefore, the reward could not have been allowed in this case completely ignoring the amendments, which came into force in April 1989, merely because the seizure was in February 1989. That apart, under the Scheme final reward is postulated only on adjudication of the case resulting in confiscation of the goods as found stated in clause 6 of the Guidelines and that should, therefore, be crucial and the relevant date for consideration of award and, therefore, the Guidelines, as are in force on the date, will be really applicable and would be relevant. Consequently, the exclusion of the amendment, which was made in April 1989, from consideration in this case, may not be proper, and the conclusion to the contrary by the High Court, cannot be sustained."

(Emphasis supplied)

41. The above settled proposition of law has been adopted by the Hon''ble Supreme Court in a matter of consideration of an application for appointment on compassionate ground relying upon the aforesaid decisions of State Bank of India and Another Vs. Raj Kumar, (2010) 11 SCC 661 : (2011) 1 SCC(L&S) 150 and the relevant portions of the above decision are quoted below:-

"9. Normally, the three basic requirement to claim appointment under any scheme for compassionate appointment are: (i) an application by a dependent family member of the deceased employee; (ii) fulfilment of the eligibility criteria prescribed under the scheme, for compassionate appointment; and (iii) availability of posts, for making such appointment. If a scheme provides for automatic appointment to a specified family member, on the death of any employee, without any of the aforesaid requirements, it can be said that the scheme creates a right in favour of the family member for appointment on the date of death of the employee. In such an event the Scheme in force at the time of death would apply.

10. On the other hand, if a scheme provides that on the death of an employee, a dependent family member is entitled to appointment merely on making of an application, whether any vacancy exists or not, and without the need to fulfil any eligibility criteria, then the scheme creates a right in favour of the applicant, on making the application and the Scheme that was in force at the time when the application for compassionate appointment was filed, will apply. But such schemes are rare and in fact, virtually nil."

(Emphasis supplied)

42. The above proposition of law has also been applied by the Hon''ble Supreme Court in the matter of Kuldeep Singh Vs. Govt. of NCT of Delhi, AIR 2006 SC 2652 : (2006) 6 JT 199 : (2006) 6 SCALE 588 : (2006) 5 SCC 702 : (2006) 3 SCR 335 Supp : (2006) AIRSCW 3627 : (2006) 5 Supreme 742 , while considering the right of an applicant in the matter of granting of liquor vend licence under Delhi Liquor Licence Rules, 1976. The relevant portion of the above judgment is quoted below:-

"36. In a case of this nature where the State has the exclusive privilege and the citizen has no fundamental right to carry on business in liquor, in our opinion, the policy which would be applicable is the one which is prevalent on the date of grant and not the one, on which the application had been filed. If a policy decision had been taken on 16-9-2005 not to grant L-52 licence, no licence could have been granted after the said date."

(Emphasis supplied)

43. After taking into consideration the provisions of sub-Section (1) of Section 3 of the said Act, 1955, read with Clause 5 of annexe to paragraph 7 of the said Control Order, 2001 and those of the said Control Order, 2013 it is crystal clear that no vested right is created in favour of an applicant for granting licence in this favour merely on making of an application, notwithstanding any need to fulfil any eligibility criteria, under the provisions of the said Control Order, 2013. The vested right is created in favour of such applicant consequent upon granting licence in his favour after fulfillment of eligibility criteria prevailing on the date grant and not the one, on which the application has been filed.

44. It is not in dispute that the impugned Government orders are made applicable while processing the vacancies for which inquiries may be ongoing or complete but have not been approved by the Department for engagement or issue of licence. Law laid down by the Hon''ble Supreme Court in the matter of R. Padmanavan (Supra), Kuldeep Sing (Supra) and Raj Kumar (Supra) is applicable in these cases. Therefore, save and except condition No. 1 of the said first impugned Government order with regard to maintaining a balance of Rs. 5 lakh on the day of application and one year preceding the date of application, the decision making process of the respondent authorities to direct the applicants to fulfil the conditions prescribed in the impugned orders in addition to fulfillment of the criteria mentioned in paragraph 7 of the said Control Order, 2013 cannot be interfered with. The impugned Government orders are of legislative in character and those are introduced under the provisions of Section 3 of the said Act, 1955. It is made clear that propriety of condition No. 1 of the first impugned Government order with regard maintaining of bank balance of Rs. 5 lakh on the date of application and one year preceding the date of application will be considered in the latter part of this judgment.

45. After considering the decisions of Jagdish Chandra Singh Bora and Anr. (Supra) and Basant Agrotech (India) Limited (Supra), this Court is of the opinion that the above decisions have no manner of application in the instant case since it has already been held that retrospective effects have not been given to conditions prescribed in the impugned orders save and except condition No. 1 of the first impugned order regarding maintenance of bank balance of Rs. 5 lakh on the date one year preceding the date of application. The subject-matter involved in the matter of K.C. Dora (Supra) was the absence of clear intention to give prospective effect to the new statute as indicated hereinabove. The impugned Government orders contained clear intention of applicability of conditions

prescribed in those orders. In the case of the applications in respect of which inquiries are ongoing or complete but have not been approved by the Department for engagement or issue of licences. Similarly, the subject matter involved in the matter of P. Mahendran (Supra) was to ascertain the mentioning of the intention to give retrospective effect to the impugned rules. The decision of Abhijit Baidya (Supra) has no manner of application in the instant case in view of the distinguishable facts and circumstances involved in that case.

(C) Applicability of the provisions of Article 14 of the Constitution of India:

46. It is now well-settled proposition of law that framing rules, regulations and control orders in course of discharging legislative function has to be examined strictly in terms of the provision introduced thereunder. Reference may be made to the decision of Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., AIR 1987 SC 1802 : (1987) 2 CompLJ 10 : (1987) 12 ECR 199 : (1987) 2 JT 107 : (1987) 1 SCALE 728 : (1987) 2 SCC 720 : (1987) 2 SCR 841 : (1987) 2 UJ 198 and the relevant portions of the above decision are quoted below:-

"5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing--there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example levying a municipal rate - in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

(Emphasis supplied)

47. In view of the above settled proposition of law there is no scope of holding that the decision making process of the respondent authorities in issuing the impugned rules has been vitiated for giving no opportunity of hearing to the petitioners. Needless to point out that the impugned Government orders are applicable in general in respect of all concern in the State of West Bengal. Therefore, there is no substance in the submissions made with regard to alleged discrimination.

48. The decision of Bedanga Talukdar (Supra) has no manner of application in this case taking into consideration the subject-matter involved in the above matter. It was invalid exercise of power in the matter of relaxation of the selection procedure stipulated in the advertisement published in connection of a

selection process.

(D) Validity of condition No. 1 of the first impugned order for maintaining a bank balance of Rs. 5 lakh as working capital as reflected on the day of application and one year preceding the date of application:

49. It is not in dispute that the conditions contained in the first impugned Government order have been made applicable while processing vacancies for which inquiries may be ongoing or complete but have not been approved by the Department for engagement or issue of licence. Taking into consideration the above facts that inquiries in respect of their applications are ongoing or complete but have not been approved by the Department for engagement or issue of licence, the provisions of the impugned orders are applicable to all petitioners.

50. It is also not in dispute that the selection processes for engagement of dealers under the said Control Order, 2013 in response to which the petitioners submitted their above applications are not cancelled. An option is given to the petitioners to comply with the conditions prescribed in the impugned Government orders for considering their applications.

51. It is the settled proposition of law that a subordinate legislation can be given retrospective effect provided such power in this behalf is contained in the main Act. A delegatee can make the rules within the four corners of the main Act because the rule making is species of delegated legislation. Reference may be made to the decision of Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, (2006) 3 JT 544 : (2006) 143 PLR 159 : (2006) 3 SCALE 178 : (2006) 3 SCC 620 : (2006) 145 STC 350 : (2006) AIRSCW 1500 : (2006) 2 Supreme 693 and the relevant portions of the above judgment run as follows:

"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retrospective operation, if any power in this behalf is contained in the main Act. The rule making power is a species of delegated legislation. A delegatee therefore can make rules within the four corners thereof."

(Emphasis supplied)

52. Taking into consideration the condition No. 1 of the first impugned order reading the same with its footnote, I am of the opinion that condition of maintaining bank balance of Rs. 5 lakh as working capital is imposed as reflected on the day of application and also as reflected one year preceding the date of application. Therefore, retrospective effect is given to the above condition of maintaining bank balance of Rs. 5 lakh on the day of application and for one year preceding the date of application so far as the petitioners are concerned.

53. After considering the provisions under Section 3 of the said Act, 1955, in exercise of which the first impugned Government order is issued, does not empower the delegatee to give retrospective effect to the aforesaid subordinate legislation in exercise of power conferred under Section 3 of the said Act, 1955.

54. Further, according to the settled proposition of law, where a duty or charge is created by the law which one cannot possibly perform without any default in him, there the law will in general excuse that person. Reference may be made to an order passed by the Hon''ble Supreme Court "IN RE: PRESIDENTIAL POLL" under Advisory jurisdiction, reported in In Re: Presidential Poll, AIR 1974 SC 1682 : (1974) 2 SCC 33 : (1975) 1 SCR 504 and the relevant portions of the above order are quoted below:-

"15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as many appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex not cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See on Statute Law 6th Ed. At p. 268).

(Emphasis supplied)

55. It appears that compliance of the condition No. 1 of the first impugned Government order of maintaining a bank balance of Rs. 5 lakh as working capital as reflected on the day of application and one year preceding the date of application rendered impossible by circumstances over which the interested petitioners have no control, in spite of having capacity to comply with the above condition without any default in those petitioners and having no remedy over it. Here the law will in general excuse them.

56. In view of the discussions and observations made hereinabove, the respondent authorities are directed not to enforce the condition No. 1 of the first impugned Government order of maintaining a bank balance as working capital as reflected on the day of application and one year preceding the date of application in respect of intending petitioners having capacity to fulfil the order conditions of the impugned orders while processing vacancies for which inquiries are ongoing or complete but have not been approved by the Department for engagement or issue of licence. It is further made clear that maintaining of a bank balance of Rs. 5 lakh as working capital on the day of submitting fresh and revised documents has to be fulfilled by the intending petitioners, if the same is insisted upon.

57. Considering the fact of expiry of the period prescribed by the respondent authority to fulfil the above conditions during the pendency of these writ applications, time to submit fresh and revised documents is extended for a period of one month.

58. These writ applications succeed partially to the extent mentioned hereinabove and the same are disposed of accordingly.

59. There will be, however, no order as to costs.

60. 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.