
(2013) 09 CAL CK 0032

In the Calcutta High Court

Case No : W.P. Nos. 17936 and 18371 (W) of 2013

Rajesh Dhanuka

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 2 CHN 341

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Dipankar Datta, J.—These two writ petitions are directed against an undated order of the Director, District Distribution, Procurement and Supply (hereafter the Director), which was conveyed, inter alia, to the two petitioners vide memo dated May 3, 2013. While acting in compliance with an order dated May 16, 2012 passed by an Hon'ble Division Bench of this Court, the Director opined that neither of the two petitioners was capable of performing distribution of foodgrains from their offered locations and that they are not eligible for appointment as distributor under the West Bengal Public Distribution System (Maintenance and Control) Order, 2003 (hereafter the Order). It was, accordingly, directed that the candidature of all the applicants who had applied pursuant to the vacancy notice dated February 8, 2006 stands cancelled. There have been several previous rounds of litigation before this Court in connection with the selection process that was initiated for appointment of a distributor at Assam More, Jalpaiguri pursuant to vacancy notice dated February 8, 2006. The order dated May 16, 2012 referred to in the impugned order was passed in connection with MAT 598 of 2012, being a writ appeal preferred by the petitioner in W.P. 17936 (W) of 2013 (hereafter Rajesh). In such appeal, the petitioner in W.P. 18371(W) of 2013 (hereafter Sunil) was the first respondent whereas the State and the officers of the Food and Supplies Department were the other respondents. The operative part of the order dated May 16, 2012 is quoted

below:

"Therefore, after quashing the said report, it appears to us that fresh verification should be done in the matter in terms of the control order under Clause 23(iii) of the West Bengal Public Distribution System (Maintenance and Control) Order, 2003 and should start from the level from which the Division Bench upheld the decision of the Single Bench and quashed the 3rd enquiry report. Accordingly, we hold that the enquiry should be made from that stage and enquiry report should be placed before the authority to give effect to the said recommendation of panel which was placed before the authority.

Accordingly, in our opinion, the order so passed by the Hon"ble Single Judge cannot sustain in the eye of law and has to be set aside on the ground that enquiry should have been done by the authorities for such appointment from the stage where the Court set aside the 3rd enquiry report and thereby the said list cannot be said to be reached its finality in respect of choosing the person in question. Such facts, in our opinion, escaped from the mind of the Hon"ble Single Judge.

Hence, we allow this appeal and direct the said authority to complete the enquiry for a period of six months from the date of the communication of the order to give effect thereto in accordance with the provisions of law."

2. The Director by an order dated August 07, 2012 had appointed Jamini Kumar Baidya, Officer-on- Special Duty and ex-officio Joint Director, District Distribution, Procurement and Supply (hereafter the OSD) for an on spot enquiry on the status of the competing candidates for appointment as Distributor for the subject vacancy. It appears from the report dated November 30, 2012 of the OSD that an enquiry was conducted on November 21, 2012 and a proforma report of each candidate on the factual position of godown alongwith other allied matters was prepared whereupon signature of both Rajesh and Sunil were obtained as a mark of their knowledge of the contents of enquiry. It further appears that one of the three competing candidates, Jugal Kishore Shanghai (hereafter Jugal) was not present during the enquiry and on local enquiry it was revealed that the godown proposed by him presently was not under his possession. The enquiry report also contained "points of anomalies" insofar as Rajesh and Sunil are concerned. It would be proper to set out from the report of the OSD the points of anomalies found by him, reading as follows:

"1. Report on Sunil Saha

(a) The rented godown has two doors which is not ideal.

(b) 190 ft. approach road from the truckable main road is Kachha (Mud-built) one which is not worthy for ply of load truck.

(c) The character of the land on which the godown is constructed is "Sahari" which is an "Agri land" and needs conversion. No conversion was done. Moreover, the land lord as stated has no "Record of Right", i.e., parcha of land.

(d) The location of the godown is situated beyond 500 metre of the vacancy spot which contravenes the stipulation imposed in the Vacancy - Notice.

2. Rajesh Dhanuka:

(a) The godown of Mr. Dhanuka is rented one. Landlady of the godown is Smt. Sabita Chowdhury the husband of whom, Sri Nirbhay Chowdhury, is a Distributor in the Sub-Div.

(b) According to the agreement with Smt. Chowdhury, the constructed godown is on 2(two) Dag. i.e., Dag No. -1028& 1029 but in accordance with Site Plan of the deed the godown is situated on Dag No. - 7027 & 1028 (details of godown s location shown in each proforma report). Dag No. 1029 is adjacent to truckable main road.

(c) Dag No. - 1029 is vacant and not given on rent. So, entry to the godown will not be possible, if the vacant space of Dag 1029 remains outside agreement in between the Lessor and the Lessee. So, virtually the operation of the godown will be kept under the control of Mrs. and Mr. Chowdhury, Land Lady and her husband.

(d) Moreover, the vacant land under Dag No. -1029 bearing 0.07 Dec. area is Kaccha one, the distance from main road to the godown is 250 ft. (approx.) and as it is Kaccha (Mud-built) loaded truck cannot be able to ply."

3. The last two paragraphs of the report have a bearing on the issue raised in these two writ petitions and, therefore, are set out below:

"Considering the points of discrepancies notes aforesaid, in my opinion no one is qualified and eligible for appointment as MR Distributor at Assam More, Jalpaiguri.

So, a re-vacancy may be declared at the same place where the contending candidates may be given liberty to apply afresh alongwith all others."

4. On consideration of the enquiry report of the OSD, the Director was of the view that the location, accessibility and functionality of the godowns proposed by the two petitioners is seriously questionable from the operational point of view.

5. The order impugned has been assailed by Mr. Bhattacharya, learned senior advocate for Rajesh and Mr. Bandyopadhyay, learned senior advocate for Sunil on various grounds. I have also heard Mr. Sengupta, learned advocate for the respondents in answer thereto.

6. Having regard to the ultimate order I propose to pass on these writ petitions, it is not considered necessary to trace the history thereof. Suffice it to record that a few legal issues that have been urged by them upon due consideration is found to be tenable and in my view, for the discussions that would follow, the petitioners are entitled to have an order of quashing of the order impugned and for issuance of appropriate directions to set things right.

7. The enquiry report of the OSD was a material which was considered by the

Director in reaching the conclusions he did. A contention has been raised that the petitioners were not furnished the enquiry report of the OSD and in relying upon the same the Director acted in breach of principles of natural justice. I do not accept the contention, since the Director was complying with the order dated May 16, 2012 and such order did not specifically require the petitioners to be made aware of the enquiry report; hence, there was no question of offering any opportunity of hearing to the petitioners to controvert the contents of the same and to make submissions in respect thereof before the Director passed the impugned order.

8. Next, it appears that apart from conducting on-spot enquiry in terms of the order of the Director and noting the features of the godowns proposed by Rajesh and Sunil as well as its surroundings, the OSD proceeded to give his independent opinion as to whether any one of them along with Jugal was qualified and eligible for appointment as Distributor or not. A recommendation also appears to have been made that the vacancy may be advertised afresh. It has been urged that the OSD had no business to give his opinion/recommendation in the matter. He was supposed to enquire and place the facts before the Director and it was for the Director to forward the file with his comments to the State Government for necessary approval. I quite agree with the petitioners that paragraph 23 of the Order does not expressly authorize the enquiry officer to give any opinion/recommendation and it might seem that the OSD overstepped his brief. But it cannot be overlooked that the enquiry in terms of sub-paragraph (ii) of paragraph 23 may be ordered if the Director does not agree with the enquiry report of the Sub-divisional Controller or the recommendation of the District Controller. It is, therefore, of utmost importance that the Director must be given a correct picture to enable him take a proper decision in the matter. While finding out what the factual situation is, if an officer or team of officers entrusted to conduct enquiry gives his/their recommendation, per se the same may not amount to an act in excess of jurisdiction. After all, it is the enquiry officers) who is/are in a better position to report to the Director all that they have perceived through their senses. Should a report of enquiry reflect factual aspects that are undisputed and the recommendation is based thereon, such recommendation made by the enquiry officers) by itself may not be sufficient to render the process invalid. If the recommendation is based on undisputed factual aspects, what ought to be examined is whether such recommendation is accepted mechanically or not. There cannot be any doubt that a mechanical acceptance of the recommendation cannot be countenanced, and hence effort must be directed towards arriving at a decision that is free from bias, arbitrariness, and the like but based on cogent and relevant considerations.

9. However, the report of the OSD has to be considered from a different angle. Here, the Order does not provide any criteria for evaluation of the comparative merits and demerits. Had such criteria been provided and the OSD prepared his report applying such criteria followed by acceptance thereof by the Director by applying his mind independently, the approach would have been unexceptionable.

10. The procedure that has been followed in the present case, however, leaves much to be desired. The OSD had given his opinion in the enquiry report that none of the petitioners was qualified and such opinion was accepted by the Director. As it appears from the impugned order, the Director seems to have been greatly influenced by the findings as well as the opinion of the OSD. The OSD observed in his report that the godown proposed by Sunil has two doors, which is not ideal. Why it is not ideal has not been indicated in the report. The Director accepted the observation without creating a fuss. In the absence of any laid down criteria, should it be left to the officers of the department who are delegated the power to enquire to decide what is ideal and what is not? I do not think so. It is a matter of paramount importance to lay down the criteria for evaluation, or else it would be left to the perception of individual officers as to what according to them is ideal or not. True, it is the function of the Court to examine as to whether the laid down criteria for evaluation has been properly applied or not and not to lay down criteria that it considers to be proper or wise; but at the same time in the absence of any criteria laid down by the competent authority, it passes my comprehension as to how a godown having two doors could be viewed as not ideal. The right claimed by a party to have a proper consideration of his claim for distributorship is valuable and a decision thereon ought not to be left to the whim, caprice or fancy of an individual enquiry officer. That a godown having two doors is not ideal ought to have been shown by reference to empirical data collected in respect of licensed godowns with two doors. Unfortunately, no attempt in this direction appears to have been made. I am minded to believe that a godown having a second door could be handy and used as an emergency exit, should there be an incident of fire. At least there is nothing on record to rule out the necessity of a second door. The respondents being public authorities, they have a duty to act fairly, for, duty to act fairly is part of fair procedure envisaged in Article 14 of the Constitution. In the absence of any policy or principle for determining suitability, the Director by mechanically accepting the report of the OSD failed to dispense justice at his end.

11. That apart, whether Sunil by not obtaining conversion certificate rendered himself unsuitable for selection is one other point that may be examined. Mr. Bandyopadhyay by relying on a decision of an Hon'ble Division Bench of this Court dated August 25, 2011 in APOT No. 116 of 2011 (Mis. Sundarban Supply Centre and anr. v. State of West Bengal and ors.) contended that obtaining of conversion certificate could not be insisted upon and only possession of the proposed place of business ought to have been regarded as sufficient. The OSD and the Director thus proceeded on a misconception to declare the candidature of Sunil invalid.

12. Regarding Rajesh, it appears that unnecessary importance has been attached as to who is his landlord and what might happen in future should the godown proposed by him were accepted for the purpose of grant of distributorship. Also, there is a subjective opinion of the enquiry officer that the kuchcha road leading to the godown would not be able to bear the load of a truck with commodities.

13. Thus, in the special facts and circumstances of the cases, opinion(s) recorded by the OSD could not have been considered by the Director without granting opportunity to the petitioners to apprise him of the vulnerability from which such opinion(s) suffered. Opportunity should have also been given to Rajesh and Sunil to persuade the Director to hold that the discrepancies that were observed by the OSD were not such so as to warrant a finding that the location and the surroundings were not conducive for performing the functions of a distributor of foodgrains.

14. Paragraph 23 of the Order is the provision relating to appointment of distributor. It does not ordain that the Director would mechanically accept the report of the enquiry officer. The decision that the Director had to take in the circumstances of the present cases was required to be based on proper application of mind not only to the features of the godowns that were offered and its surroundings but also having regard to the fact as to whether distributors have been appointed at other places where common features are in existence. The Director ought to have looked into the records to ascertain whether in the past licence has been issued in respect of any godown having two doors or not. He also ought to have ascertained as to whether all the godowns in respect whereof licences have been issued are accessible from the main road/highway through a metal road or kuchcha road. The requirement to obtain conversion certificate, whether could be insisted upon, is one other point for consideration. All these factors do not appear to have exercised the consideration of the Director and it is only on this ground that the order of the Director ought to be quashed.

15. There is one other reason for which the order of the Director is indefensible. Paragraph 21(iii) of the Order requires the Commissioner to approve the order of the Director. Although the impugned order records concurrence of the Commissioner having been obtained, no such concurrence could be shown by Mr. Sengupta. In his usual fairness, Mr. Sengupta submitted that he had looked into the file and had observed therefrom that the Commissioner had only mentioned the word "seen". In my opinion, the Commissioner was also required to apply his mind on the question of approval. That is sadly lacking.

16. In the result, I quash the impugned order contained in memo dated May 3, 2013. The Director is directed to grant opportunity of hearing to the petitioners within four weeks from date of receipt of a copy of this order. They shall be at liberty to persuade the Director not to accept the report of the enquiry officer. Upon consideration of the documents that might be produced by the petitioners and upon hearing them, the Director shall proceed to make necessary recommendation (either positive or negative) supported with reasons within two weeks of completion of hearing in terms of this order, which shall thereafter be placed before the Commissioner for appropriate order. Since the vacancy was declared more than 7 years back and the issue of appointment of a distributor could not be finalized because of series of litigation before this Court, I consider

it proper to direct the Commissioner to give his final decision (either accepting or rejecting the recommendation of the Director) as early as possible on receipt of recommendation from the Director.

17. Since the order of the Director contained in memo dated May 3, 2013 has not been questioned by Jugal, he is presumed to have abandoned his claim for appointment and, therefore, he need not be heard.

18. The writ petitions stand disposed of without order for costs. Photocopy of this order, duly countersigned by the Assistant Court Officer, shall be retained with the records of W.P. No. 18371 (W) of 2013. Urgent photostate certified copy of this order, if applied for, shall be furnished to the applicant at an early date.