(2015) 08 CAL CK 0071

In the Calcutta High Court

Case No : A.S.T. Nos. 25, 18 of 2015 and C.A.N. No. 2760 of 2015

Somesh Jana and Others — APPELLANT

Vs

State of West Bengal and Others — RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Citation : (2016) AIR (Cal) 22 : (2015) 4 WBLR 94

Hon'ble Judges : P.K. Chattopadhyay and Ishan Chandra Das, JJ.

Bench : Division Bench

Advocate : Saktinath Mukherjee, Debabrata Saha Roy, Pingal Bhattacharyya and Arindam Deb Roy, for the Appellant; L.K. Gupta, Kishore Dutta, Susovan Sengupta and Sirsanya Bandyopadhyay, for the Respondent

Final Decision : Disposed Off

Judgement

P.K. Chattopadhyay, J.—The appellants herein filed a writ petition challenging Show-cause-cum-Suspension order dated 20th February, 2015 issued by the District Controller (F & S), Purba Medinipur. The learned Single Judge by the impugned order under appeal directed the parties to file affidavits in connection with the writ petition and refused to pass any interim order in the said writ petition. The appellants herein being aggrieved by the aforesaid refusal of the learned Single Judge to pass any interim order preferred an appeal and also filed an application in connection with the said appeal.

2. The appellants herein challenged the validity and/or legality of the aforesaid Show-cause-cum-Suspension order dated 20th February, 2015 mainly on the following grounds:-

(a) No physical verification of the stock was taken as per Paragraph 30 of the West Bengal Public Distribution System Control Order, 2013.

(b) The notice dated 20th February, 2015 does not record formation of opinion that immediate suspension was required/necessitated.

(c) The writ petitioner/appellant has been asked to Show-cause why penal action shall not be taken for violation of West Bengal Public Distribution System Control Order, 2013 in violation of Paragraph 31 of the said Control Order, 2013.

3. Referring to the impugned show-cause notice dated 20th February, 2015, Mr. Saktinath Mukherjee, learned Senior Counsel of the appellants submitted that actual physical verification of stock was not undertaken by the respondents in compliance with the provisions of Paragraphs 29(5) and 30(f) of the West Bengal Public Distribution System (Maintenance and Control) Order, 2013 (hereinafter referred to as Order, 2013). Mr. Mukherjee also submitted that the actual weighment of the stock was really necessary in the present case since in the show-cause notice, it was specifically mentioned that no separate stag was maintained by the said M.R. distributor for which category wise stock position could be ascertained.

4. Mr. L.K. Gupta, learned Additional Advocate General however, submitted that the provisions of Paragraph 30(f) of the West Bengal Public Distribution System Control Order, 2013 inter alia provides that, "take or cause to be taken the weight of........." which implies that the weight of the commodities is to be calculated and does not contemplate physical weighment of the commodities. According to Mr. Gupta, if the weight of the PD commodities could be ascertained even without physical weighment, the intention of the legislature would be satisfied.

5. Mr. Gupta further submitted that the appellants herein did not challenge the counting of the bags. According to Mr. Gupta, it could only be alleged that handling loss was not taken into consideration. Mr. Gupta submitted that if handling loss was considered then the quantum of shortage would increase to the detriment of the interest of the appellants. Mr. Mukherjee however, submitted that there was no actual shortage of stock and the respondent District Controller (F & S) should have granted an opportunity to the M.R. Distributor concerned to explain the matter before asking to show-cause why penal action should not be taken.

6. However, it is not in dispute that the enquiry team while ascertaining the stock position of the public distribution commodities in respect of the M.R. Distributorship in question did not take actual weight of the commodities found in the premises in question. It has been submitted on behalf of the appellant that the impugned show-cause notice dated 20th February, 2015 does not record satisfaction of the competent authority about the necessity of immediate suspension of the M.R. Distributor Licence in question.

7. The learned Senior Counsel of the appellants specifically submitted that in terms of Paragraph 31(b) of the Order, 2013, District Controller (F & S) could place the licence of the concerned M.R. Distributor under suspension only after forming a specific opinion to the effect that immediate suspension of the said licence was necessary in the interest of general public. Mr. Mukherjee, learned

Senior Counsel of the appellants submitted that the District Controller (F & S) never formed any opinion for immediate suspension of the licence of the M.R. Distributorship of the appellants. The said paragraph 31(b) of the Maintenance & Control Order, 2013 is set out hereunder:-

"31. (b) If a Distributor or his authorized agent or employee or any other person acting on his behalf contravenes any of the provisions of this order or any of the regulations made there under or any of the conditions of his licence or any discrepancy is detected on examination of the documents and/or stock of public distribution commodities or weighing devices, the District Controller, Food and Supplies shall issue a notice to the distributor for showing cause in writing of such contravention or discrepancy".

8. Mr. Mukherjee further submitted that the suspension of the licence of the M.R. Distributorship in question of the appellants herein is bad and without jurisdiction for not complying with specific provision of Paragraph 31(b) of the Maintenance & Control Order, 2013. Mr. Mukherjee relied on the following decisions in support of his arguments:

1. State of Haryana Vs. Hari Ram Yadav and others, .

2. Smt. Puspa Rani Kar v. Directorate of Food & Supplies, reported in 1979 (2) CHN 21 (Paras. 4 & 5).

9. Mr. Gupta, learned Additional Advocate General, however, submitted that the language in the show-cause nonce dated 20th February, 2015 specifically mentioned the opinion for the suspension of the licence in respect of the M.R. Distributorship in question although the word ''immediate'' was not used and/or mentioned which according to Mr. Gupta could not be fatal since the order was supposed to take effect immediately. Mr. Gupta invited our attention to the relevant portion of the judgment of the Hon''ble Supreme Court in the case of Swadeshi Cotton Mills Co. Ltd. v. State of U.P. which has been quoted in the subsequent decision of the Supreme Court in the case of State of Haryana v. Hari Ram Yadav & Ors., (supra). The relevant extracts from said Paragraph 10 of the aforesaid judgment are set out hereunder:-

"Para-10.

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Reference, in this context, may be made to the decision of this Court in Swadeshi Cotton Mills Co. Ltd. v. State of U.P. wherein it has been observed : [SCR pp. 432 and 434)

"The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.

We cannot accept the extreme argument of Shri Aggarwala that the mere fact that the order has been passed is sufficient to raise the presumption that conditions precedent have been satisfied, even though there is no recital in the order to that effect. Such a presumption in our opinion can only be raised when there is a recital in the order to that effect. In the absence of such recital if the order is challenged on the ground that in fact there was no satisfaction, the authority passing the order will have to satisfy the Court by other means that the conditions precedent were satisfied before the order was passed. We are equally not impressed by Shri Pathak''s argument that if the recital is not there, the public or Courts and tribunals will not know that the order was validly passed and therefore it is necessary that there must be a recital on the face of the order in such a case before it can be held to be legal. The presumption as to the regularity of public acts would apply in such a case; but as soon as the order is challenged and it is said that it was passed without the conditions precedent being satisfied the burden would be on the authority to satisfy by other means (in the absence of recital in the order itself) that the conditions precedent had been complied with."

10. Mr. Gupta submitted that in the present case validity of the impugned order of suspension of the M.R. Distributorship Licence in question does not depend upon the recital of the formation of the opinion in the Order. Mr. Gupta further submitted that in view of the aforesaid decision of the Hon''ble Supreme Court in the case of Swadeshi Cotton Mills Co. Ltd. v. State of U.P. (supra) if by inadvertence formation of the opinion regarding immediate suspension of the licence is not mentioned in the preamble to the order, the said defect can be removed by showing other evidence in the proceedings.

11. In the present case, however, we do not find any material wherefrom at least prima facie it could be said that the District Controller (F & S) ever formed any opinion that immediate suspension of the M.R. Distributorship Licence in question was necessary.

12. The real question is whether the concerned Officer formed an opinion regarding immediate suspension of licence of the M.R. Distributorship in question of the appellants herein on the basis of the available records and after proper application of mind. The Court is not supposed to form any opinion in this regard.

The District Inspector (F & S), "Purba Medinipur was required to form opinion on the basis of the available records as to whether immediate suspension of the licence in respect of M.R. Distributorship in question was necessary.

13. It has also been argued on behalf of the appellants that the District Controller (F & S) found the M.R. Distributor guilty even at the age of issuing show-cause notice. The learned Senior Counsel of the appellants submitted that the respondent District Controller (F & S) in the Impugned show-cause notice dated 20th February, 2015 asked the M.R. Distributor concerned to show-cause why penal action will not be taken for violation of the Maintenance & Control Order, 2013. The relevant extracts from the aforesaid notice are set out hereunder:-

"I am of the opinion by taking into account of such prima facie irregularities/ illegality committed by the said MR distributor and also taking into account of public interest your MR distributor licence bearing No. MDN (E)-CONT-834 is placed under suspension till disposal of the proceeding and you are directed to show cause within seven days from the date of receipt of this letter why penal action will not be taken against you for violation of West Bengal Public Distribution System (Maintenance & Control) Order 2013."

(Emphasis supplied)

14. Mr. Mukherjee, learned Senior Counsel of the appellants relied on a decision of the Hon''ble Supreme Court in the case of ORYX Fisheries Private Limited Vs. Union of India (UOI) and Others, , Paragraph 27 of the aforesaid judgment is set out hereunder:-

"Para-27, It is no doubt true that at the stage of show-cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony."

15. Mr. Mukherjee submitted that in terms of Paragraph 31(c) of the Order 2013, District Controller (F & S) upon receiving the reply from the distributor concerned and after giving an opportunity of being heard and also recording the reasons may impose penalty. The said Paragraph 31(c) is set out hereunder:?

"Para-31. (c) On receiving the reply from the distributor, the District Controller, F & S, after giving the licensee an opportunity of being heard and after recording the reasons thereof, may terminate the licence or may reduce the volume of business through reduction of tagged dealers and/or impose a fine according to the gravity of the offence as annexed in Schedule-B hereinafter with the approval of the District Magistrate.

In case of imposition of fine, the licensee shall have to deposit the fine amount with the District Controller, F & S, through Treasury Challan in TR Form No. 7 under the Head of Account as prescribed by the Government.

The proceedings drawn against the distributor shall have to be completed by the concerned District Controller, F & S, within sixty days from the date of serving notice asking for show cause."

16. Mr. Gupta submitted that the penal action mentioned in the show-cause notice is nothing but the purpose of issuing show-cause notice. Mr. Gupta submitted that the penal action is different from penalty. The learned Additional Advocate General on behalf of the said respondents specifically submitted that by the impugned show-cause notice, no penalty has been proposed.

17. We, however, find that the respondent District Controller (F & S) before receiving any reply with regard to the alleged discrepancy relating to the stock of M.R. commodities and also with regard to the other alleged irregularities mentioned in the show-cause notice, asked the said M.R. Distributor to show-cause why penal action will not be taken for violation of Maintenance & Control Order, 2013 which prima facie, established that the respondent District Controller (F & S) prejudged the issues at the stage of issuance of show-cause notice specially with regard to the alleged guilt of the M.R. Distributor concerned, which is not permissible under the law.

18. For the reasons discussed hereinabove, we are of the opinion that a strong prima facie case has been made out for staying the operation of the suspension order of the M.R. Distributor Licence of the appellants pending final disposal of the writ petition.

19. We are however, also of the opinion that the issues raised in the writ petition should be decided expeditiously. Therefore, we request the learned Single Judge to decide the writ petition as early as possible and preferably on or before 30th September, 2015. Pending disposal of the aforesaid writ petition filed by the appellants herein, we also stay the operation of the order of suspension in respect of the M.R. Distributor Licence in question bearing No. MDN (E) - CONT-834. We however, make it clear that any observations made by us hereinbefore are purely tentative in nature and the learned Single Judge should not be influenced by the same under any circumstances while deciding the writ petition on merits.

20. With the aforesaid observations and directions, we dispose of both the stay application as well as the appeal.

21. In view of final disposal of the appeal and the connected stay application, we find no scope to entertain the application for addition of party being C.A.N. 2760 of 2015 at this stage and the same is therefore disposed of without any further direction.

22. In the facts of the present case, there will be no order as to costs. Let a

photostat plain copy of this order duly countersigned by the Assistant Registrar (Court) be handed over to the learned Advocate appearing for the parties on usual undertaking.

Ishan Chandra Das, J.

I agree.

