

**(2016) 07 CAL CK 0017**  
**In the Calcutta High Court**  
**Case No : W.P. No. 5447 (W) of 2015**

Somesh Jana

APPELLANT

Vs

The State of West Bengal

RESPONDENT

**Date of Decision :** 14-07-2016

**Acts Referred:**

West Bengal Urban Public Distribution System (Maintenance and Control) Order, 2003  
— Paragraph 29(5), 30(f), 31(B), 31(C)

**Citation :** (2016) 3 CalLT 303

**Hon'ble Judges :** Samapti Chatterjee, J.

**Bench :** Single Bench

**Advocate :** Mr. Sakti Nath Mukherjee, Mr. Ram Anand Agarwal, Mr. Debabrata Saha Roy, Ms. Nibedita Pal, Mr. Ramesh Dhara, Mr. Pingal Bhattacharyya and Mr. A.G. Mukherjee, Learned Advocates, for the Appellant; Mr. L.K. Gupta, Learned Addl. Advocate General, Mr. Susovan

**Final Decision :** Allowed

## Judgement

Samapti Chatterjee, J.—The short point involved in the matter whether the proceedings could be declared as abandoned when admittedly the authority failed to proceed as per Paragraph-31 (c) proviso of Control Order, 2013.

Fact of the Case

2. The petitioners' case in brief is as follows :- This writ application is directed against an order passed by the respondent no. 4 under his memo no. 718/DCM/Purba/15 dated February 20, 2015. By virtue of the said order, the petitioner was directed to show cause with regard to commitment of irregularities in course of running his M.R. Distributorship in Bhupatinagar-II, District-Purba Medinipur. By virtue of the order impugned, the functioning of M.R. Distributorship was suspended.

2(i). It appears that similar show cause notice cum suspension order was passed on February 10, 2015. The said notice was challenged on the ground that the

basis of passing of that order was an enquiry report which was not supplied to the petitioner. Secondly, there was formation of an opinion in connection with the provisions of Paragraph 31 (B) of the West Bengal Public Distribution System (Maintenance of Control order), 2013 and thirdly, it appears from the language said notice that the show cause notice cum-suspension that order was passed forming a final opinion at the time of issuing show cause notice. On the prayer made on behalf of the State respondents that leave might be granted to withdraw the above show cause notice allowing them to proceed afresh in accordance with law the writ petition was disposed of.

2(ii). The Hon'ble Court by an order dated 26th February, 2015 was inter alia pleased to direct the petitioners to give written reply to the impugned show cause notice but at the same time the Hon'ble Court refused to pass any order of stay of operation of the suspension of the petitioners' distributorship. Feeling aggrieved by the said order dated 26th February, 2015 the petitioners preferred an appeal before the Hon'ble Appeal Court and the Hon'ble Appeal Court by judgment dated 4th August, 2015 being prima facie satisfied was pleased to stay of the operation of the suspension in M.R. Distributor licence in question bearing No. MDN (E)-CONT-834. Some relevant portion of the said order dated 4th August, 2015 is quoted below :-

"For the reasons discussed herein above, 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 dispose of the writ petition.

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."

2 (iii). Since despite stay of operation of the suspension order by the Hon'ble Appeal Court the authority failed to allow the petitioner to resume their distributorship business, therefore, the petitioners without finding any alternative were compelled to file a contempt application before the Hon'ble Appeal Court and in the contempt proceedings petitioners were allowed to resume their business. Accordingly the contempt petition was dropped.

Submissions of the Learned Advocates

3. Mr. Sakti Nath Mukherjee, learned Senior Counsel appearing for the petitioners strongly argued that in respect of show cause notice admittedly there was no

stay, in spite of that the District Controller failed to proceed with the same thereby abandoned the proceedings by efflux of time.

4. Mr. Mukherjee further vehemently contended that it is the mandatory provision under Paragraph 31 (c) proviso of Control Order 2013 that the proceedings shall be completed within sixty days from the date of service of the notice. Paragraph 31 (c) of the said Control Order is quoted below :-

"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 proceeding 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."

5. Mr. Mukherjee further drew my attention to some relevant portions of the petition wherefrom it is revealed that the authority initiated the proceedings against the petitioners by issuing show cause notice on 20th February, 2015 and that statutory period of sixty days expired on 20th April, 2015. As the same has not been completed till date, in the result, the authority abandoned the said proceedings. In support of his contention Mr. Mukherjee relied on a decision reported in 90 CWN Page 290 (Subrata Chaki And Ors. v. State of West Bengal And Others) Paragraphs-12 and 13 which are quoted below :-

"Para-12-It would depend upon the facts and circumstances of each particular case whether because of inordinate delay either to initiate or to conclude the disciplinary proceedings, the same ought to be quashed and such proceedings have been delayed because of the conduct of the delinquent himself, he cannot certainly plead that he had been denied reasonable opportunity because of lapse of time. Again delay would not be fatal in the case the disciplinary authorities remain restrained by order of the court or are prevented by any other sufficient cause from concluding the proceedings. In the instant case, at least from the date of the disposal of the writ application by the learned Single Judge, there was no injunction upon the respondents from proceeding with the enquiries against the appellants. On the other hand, the learned trial judge had directed that the same be disposed of preferably within three months. The Division Bench in passing interim order in respect of suspension of the appellants had made adverse observation because the respondent had not taken any steps in regard to the disciplinary proceedings. No explanation for the delay of more than five and half years has been furnished either by the Commissioner, Presidency

Division, who was to act as the Disciplinary Authority, or by Mr. B. K. Biswas, who was appointed as the Enquiring Officer.

Para-13-In the instant case the charges framed in respect of the incident which allegedly occurred at the chamber of the Collector of Calcutta, the respondent no. 2, on 3rd March, 1981. In substance, the charge against the appellants was that they, inter-alia, held a violent demonstration. The annexure of the charge-sheet indicated that the charges against the appellants were proposed to be sustained by oral evidence of eight persons. The charge-sheet did not mention any documentary evidence in support of the prosecution case. Presumably, on the basis of the oral evidence the respondents proposed to establish the said charges against the appellants. The appellants are likely to be seriously prejudiced if the disciplinary proceeding against them is now started. We are not prepared to allow the respondents further time to hold enquiry when they themselves have not explained why they did not hold the disciplinary proceedings for such a long time."

6. Mr. Mukherjee further vehemently urged that in the present case the authority initiated proceedings against the petitioners by issuing show cause notice dated 20th February, 2015 and that show cause notice was not stayed by the Hon'ble Court; rather direction was given to the authority to proceed with the show cause notice in accordance with law but the authority intentionally failed and neglected to proceed with the show cause notice against the petitioners, therefore, authority is debarred from proceeding against the petitioners on the basis of show cause notice dated 20th February, 2015.

7. Mr. Mukherjee further contended that since no stay was granted by the Hon'ble Court of the impugned show cause notice therefore it was obligatory on the part of the respondent authority to proceed with the show cause notice but unfortunately in the present case the authority did not do. In support of his contention Mr. Mukherjee relied on a decision reported in 2011 (1) CHN (Cal) Page-21 Paragraph 28 (Commissioner of Central Excise, Kol-II Commissionerate & Anr. v. Shree Gobinddeo Glass Works Ltd & Ors.).

8. Mr. Mukherjee further contended that admittedly the physical verification of stock was not taken on 100% weighment basis which is a mandatory requirement under Paragraph 29 (5) and 30 (f) of the West Bengal Public Distribution System (Maintenance & Control Order) 2013 and as such no proceeding could be initiated on the basis of an inspection where the stock was assessed on eye estimation and not on physical verification.

Paragraph 29 (5) and Paragraph 30 (f) are quoted below :-

"Paragraph-29 (5) ?Physical verification of stock:- A distributor shall render all facilities for physical verification of stocks of public distribution commodities on demand by the inspecting officers in this behalf. Under all circumstances, he/she shall have to arrange sufficient number of labourers for weighment of the stocks with the help of a big scale with suitable weight stones of appropriate

denominations, so that even minimum delay is avoided. The big scale shall be kept in his/her godown."

Paragraph-30 (f)-Take or cause to be taken the weight of all or any of the public distribution commodities found in any such premises, prepare weighment charge and chart of physical verification of stock ;"

9. Mr. Mukherjee further strongly submitted that Paragraph 30 (f) of the Control Order 2013 is a mandatory provision that cannot be treated as directory one.

10. Mr. Mukherjee contended that the intention of legislature is clear in this regard that before a punishment is imposed the procedure laid down should be strictly followed and in the instant case the authority failed to follow the procedure as laid down under Paragraph 30 (f) of the said Control Order, 2013.

11. Mr. Mukherjee further emphasised that Paragraph 30 (f) of the said Control Order, 2013 cannot be described as "Directory" rather it is "Mandatory" since result of proceeding depends on the punishment to be imposed by the authority. In support of his contention Mr. Mukherjee relied on a Hon<sup>ble</sup> Supreme Court decision reported in 2009 (7) SCC Page-658 (Sarla Goel And Others v. Kishan Chand) Paragraphs-28 to 30. Therefore, in conclusion Mr. Mukherjee submitted that the writ petition should be allowed by granting the relief as prayed for.

12. Mr. L.K. Gupta, learned Additional Advocate General submitted that Paragraph 30 (f) of the Control Order 2013 is not a mandatory one but the same is directory one.

13. Mr. Gupta further contended that taking resource to the Paragraph 30 (f) of the Control Order 2013 is the discretion of the authority. It is the authority who have power to take aid of that proviso thereby carrying on 100% physical weighment of the commodities.

14. Mr. Gupta further vehemently urged that Paragraph-13 of the Control Order, 2013 provides that "Power" of the authority cannot be projected as "Mandatory duty" on the part of the authority as has been sought to be demonstrated by Mr. Mukherjee.

15. Mr. Gupta further strongly argued that 100% weighment of the commodities is not compulsory and eye estimation of bag containing 50 kgs each is sufficient to be considered as final weighment of the commodities.

16. Mr. Gupta further contended that if 100% weighment would have been done then the shortage shown in the inspection report would be more.

17. Mr. Gupta further strongly argued that Paragraph 29 (5) of Control Order 2013 is a mere requirement which is "Discretionary" one and should not be equated as "Mandatory".

18. Mr. Gupta further contended that since show cause notice was under challenge before this Hon<sup>ble</sup> Court, therefore proceedings was not initiated by

the authority, otherwise there would have been a wrong impression in the mind of the Hon'ble Court.

19. Mr. Gupta also highlighted the Hon'ble Division bench judgment dated 4th August, 2015 thereby arguing that the Hon'ble Appeal Court observed that the said judgment is purely tentative in nature and the Learned Single Judge should not be influenced by the same while deciding the writ petition and the writ petition should be decided by the Learned Single Judge on merits only.

20. Mr. Gupta also argued that mentioning of penal action in the show cause notice does not disclose any penalty therefore the petitioners are given ample opportunity to answer the said show cause notice but the petitioners failed to do so. In support of his contention Mr. Gupta relied on a Hon'ble Supreme Court decision reported in 1993 (4) SCC Page 727 (Managing Director, ECIL, Hyderabad And Others v. B. Karunakar And Others) Para-28 which is quoted below :-

"Para-28 - The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him." The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or re arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second state viz. The state of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against

the report before it arrives at his conclusion with regard to his guilt or innocence of the charges."

21. Before parting with his argument Mr. Gupta submitted that there is no infirmity in the impugned show cause notice which deserves interference by this Court.

#### Decision with Reasons

22. After considering the submissions advanced by the learned Advocates appearing for the parties and after perusing the records and the relevant paragraphs of the said Control Order, 2013 subsequently the Paragraph 29 (5) and Paragraph 30 (f) of the West Bengal Public Distribution System as indicated above I am of the view that it is the mandatory requirement on the part of the respondent authority to take 100% weightment of the stocks. But unfortunately in the case in hand the respondent authority failed to comply with the provisions under Paragraph 29 (5) and Paragraph 30 (f) of the said order 2013.

In my opinion, if it is a discretionary one then it might have been mentioned under the Paragraphs as referred to.

23. It is also on record that only on the basis of the eye estimate the respondent authority has come to the conclusion and on the basis of that, respondent authority issued show cause-cum-suspension notice on 20th February, 2015. It is also on record that Learned Single Bench of this Court on 26th February, 2015 interalia directed the petitioners to give reply to the impugned show cause notice, without staying operation of show cause cum suspension order dated 20th February, 2015.

24. Challenging the said order petitioners approached before the Hon'ble Division Bench and Hon'ble Division bench prima facie being satisfied pleased to stay the operation of the suspension order of the M.R. Distributor licence of the petitioners pending final disposal of the writ petition.

25. It is revealed from the record that despite show cause notice was not stayed by any Court of law, District Controller failed to proceed with the said show cause notice thereby abandoned the proceedings as the statutory period of sixty days from the date of issuance of the show cause notice expired as per Paragraph-31 (c) of the said Control Order, 2013 which is quoted as above.

26. In my considered view since no stay has been granted on show cause notice by any Court of law and not only that while statute prescribed that proceedings shall be completed within sixty days from the date of issuance of the show cause notice, therefore, it is obligatory on the part of the respondent authority to proceed with the said show cause notice but admittedly the respondent authority failed to do so.

26 (i). It is also not out of place to mention that against the Hon'ble Appeal Court order the respondent authority filed a Special Leave Petition before the

Hon'ble Apex Court but failed to obtain any order from the Hon'ble Apex Court. Therefore, at this stage the respondent authority cannot take the plea that since the matter was pending before the Hon'ble Court, the authority did not initiate any proceedings against the petitioners on the basis of the show cause notice dated 20th February, 2015.

27. The Court also does not find any force in the argument of Mr. Gupta that provision under Paragraph 29 (5) and Paragraph 30 (f) of the Control Order, 2013 is not a mandatory one and is a directive one. Therefore the authority may follow those paragraphs or may not.

28. In my considered view when some provision has been laid down in the statute that shall be followed by the authority at the time of inspection of the said godown but in the present case it is lacking on the part of the authority.

29. I also cannot accept the argument of Mr. Gupta that mentioning of penal action in the show cause notice does not tantamount to indicate any penalty and the respondents were free to give reply to the said show cause notice. In my considered view if it is mentioned in the show cause notice itself "to describe that why penal action will not be issued against the petitioners" that is sufficient to indicate that the respondent authority with the motive to impose punishment upon the petitioners issued the said show cause notice as a routine one which in my opinion is biased, unfair, unjust on the part of the State authority and that notice already shows vindictiveness of the authority. Further, in my mind sitting upon judgment that notice was issued. Notice was not issued for simple explanation from the petitioners. If it is so then mentioning of "Penal action" would not be there.

30. In my considered view the word "Lapsed" should be read as abandoned particularly when a statute prescribed certain criteria to be followed in a particular manner it shall be complied with by the authority in that manner only. Therefore, in my opinion "Power" becomes a duty and "May" becomes "Shall".

31. In my opinion when occasion arises to exercise the power but the authority failed to exercise the power conferred under Paragraph 29 (5) and Paragraph 30(f) of the said Control Order, 2013, on the other hand authority making allegations against the petitioners, without exercising the power vested under those paragraphs, therefore, in my considered view non performing those duties conferred under Paragraph 29 (5) and 30 (f) of the said Control Order, 2013 clearly attracts by biasness, vindictive intention which is unfair, unjust and very much contrary to principle of natural justice.

32. It is also on record that show cause notice was issued on February, 20, 2015 and till 4th August, 2015 no stay order was passed by any Court of law. Only direction was granted by the learned Trial Court to proceed with the show cause notice and its statutory period as prescribed under Paragraph 31 (c) of the said Control Order is sixty days from the date of issuance of the show cause notice but the authority not only failed to complete but also failed to initiate



proceedings as prescribed under Paragraph 31 (c) of the Control Order, 2013. It is also on record that the authority filed Special Leave Petition before the Hon?ble Supreme Court on 20th February, 2016 and on 25th April, 2016 Hon?ble Supreme Court passed order and no explanation has been given by the authority for the period from February to August, 2015 and also the period from August, 2015 to 20th February, 2016 when the authority filed the Special Leave Petition before the Hon?ble Apex Court. Therefore, in my opinion authority has abandoned the proceedings by their conduct as well as by efflux of time as prescribed under the statute.

33. Considering the discussions, above I hold that it is apparent from the conduct that the respondent authority has abandoned the proceedings which also lapsed by efflux of time as provided under Paragraph-31 (c) of the said Control Order and that the statutory mandate as prescribed under Paragraph 29 (5) and Paragraph 30 (f) of the said Control Order, 2013 has not also been followed. That being the scenario, I have no hesitation to hold that the show cause notice-cum-suspension order being Memo No. 718/DCM/Purba/15 dated 20th February, 2015 issued on the basis of inspection dated 6th February, 2015 has lost its force by efflux of time as well as by conduct of the authority, therefore, cannot be sustained in the eye of law and in the facts and circumstances of the case.

34. Accordingly, the impugned show cause-cum-suspension order dated 20th February, 2015 issued by the District Controller (F & S) Purba Medinipore as well as the inspection report dated 6th February, 2015 are hereby quashed and set aside.

35. This writ petition is allowed however no order as to costs.

36. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfilling all the formalities.