

**IN THE HIGH COURT AT CALCUTTA  
Civil Appellate Jurisdiction  
Appellate Side**

**Present:- Hon'ble Justice I. P. Mukerji  
Hon'ble Justice Md. Nizamuddin**

**F.M.A. 2134 of 2018**

**Subhas Chandra Bhunia**

**Vs.**

**The State of West Bengal & Ors.**

**For the appellant : Mr. Kalyan Bandyopadhyay, Sr. Adv.  
Mr. Ram Anand Agarwala,  
Ms. Nibedita Pal,  
Mr. Ramesh Dhara,  
Mr. A. G. Mukherjee, Adv.**

**For the respondents : Mr. Sushovan Sengupta,  
Mr. Subir Pal, Adv.**

**Judgment on : 22.12.2020**

**I. P. MUKERJI, J.**

This appeal is against a judgment and order dated 28<sup>th</sup> August, 2018, of a learned single judge dismissing the writ application made by the appellant, holding that it was “sans substance”.

This writ was made against the termination of the licence of the appellant as a dealer of a fair price shop, made by the Sub-Divisional Controller, Food and Supplies, Ghatal on 30<sup>th</sup> March, 2016 which was affirmed by the first statutory appellate authority on 17<sup>th</sup> April, 2018 and again re-affirmed on 4<sup>th</sup> July, 2018 by the second statutory appellate authority.

Allegedly an inspection of the appellant's place of business was carried out by the respondent authorities on 7<sup>th</sup> February, 2016. The proceedings were commenced on 8<sup>th</sup> February, 2016 by issuance of a show cause notice cum suspension order by the Sub-Divisional Controller to the appellant. During such inspection various

irregularities were found in his conduct of affairs. These are as follows:-

He did not maintain books of account, did not issue cash memos properly, charged higher sale price, did not maintain the stock properly and did not store the stock as required. Furthermore, there were 6.38581 quintals and 0.56117 quintals extra stock of rice and wheat respectively and a shortage of 1.284 quintals of atta. He was asked to show cause why suitable action should not be taken against him for these alleged irregularities. His licence was suspended.

The appellant filed a reply to the show cause notice.

It was adjudicated upon by the Sub-Divisional Controller. He made his decision on 30<sup>th</sup> March, 2016.

The order is very interesting to read. The first part of the order recites the 12 charges against the appellant in the show cause notice. Thereafter, the decision goes on to record that the appellant had “confessed” during the hearing that he had indulged in the irregularities mentioned in the show cause notice and was not a member of the said association. On this basis, the adjudicating officer came to the conclusion that the charges against him were proved. He came to the conclusion that the appellant had violated Clauses 19 (3), (4), (5), (6), (7), (10), (12), (13) and (14) of the West Bengal Public Distribution System (Maintenance & Control) Order 2013 (hereinafter the said Control Order) and had also breached the terms of the licence.

In exercise of his powers under Clause 24 of the said Control Order the Sub-Divisional Controller cancelled the licence of the appellant with immediate effect.

Mr. Kalyan Kumar Bandyopadhyay, learned Senior Advocate appearing for the appellant took two or three principal grounds to contest this decision. He said that in the show cause notice, the alleged violations of the said order by the appellant were not enumerated. Hence, the appellant had no chance of dealing with the allegations. Furthermore, the allegation regarding discrepancy in stock was made by the respondent authority without making a physical verification. His more important point was that the

termination of the licence of the appellant was solely on the basis of his alleged “confession”. How he had made the confession, where he had made the confession and in what manner, were not stated. If the appellant had admitted his guilt, it ought to have been in writing and tendered to the adjudicating officer. If it had been so tendered the details of the documents ought to have been specified in the order.

In fact, learned counsel said that no such admission had ever been made by his client. He added that any adjudication of any allegation or charge which was not specified in the show cause notice could not be addressed by the noticee. In such circumstances, the adjudication with regard to the additional charges was non est and invalid.

Mr. Sengupta, learned advocate for the respondent authorities argued that such admission had been unequivocally made by the appellant.

Against the decision dated 30<sup>th</sup> March, 2016 of the Sub-Divisional Controller, the appellant preferred an appeal under paragraph 25 of the said Control Order to the District Controller, Food and Supplies, Paschim Medinipur.

It may be stated now, in a writ application filed by the said Association (WP No.33258(w) of 2013) (West Bengal MR Dealers’ Association and Anr. Vs. State of West Bengal & Ors.) together with a connected application (CAN 6385 of 2015) this court on 29<sup>th</sup> July, 2015 passed an interim order restraining the Sub-Divisional Controller (F&S) from taking any “penal steps” against the members of the association.

It is noteworthy that in the appeal a solitary ground was taken by the appellant, with the rider that his right to make “comments on merit” regarding the impugned decision was kept reserved. This point was that he was a member of the West Bengal MR Dealers’ Association. The recording that he was not a member of the said association was made by the adjudicating authority without giving him an opportunity of establishing his membership.

Since, he was a member of the association he could not have been suspended by the notice dated 8<sup>th</sup> February, 2016. Nor his dealership terminated by the decision of 30<sup>th</sup> March, 2016. It was contended that

the order of termination could not have been made on 30<sup>th</sup> March, 2016.

This first statutory appeal was disposed of by the District Controller on 17<sup>th</sup> April, 2018. As a recital to the said order he recorded that the appellant was a member of the said association. The other recitals in this order are highly relevant. He stated that on 15<sup>th</sup> July, 2016 he wrote to the Joint Director (Licence), Dte. of DDP&S seeking his instructions with regard to the said interim order of this court. The joint director did not reply. Thereafter, in the decision a reference is made to the communication dated 11<sup>th</sup> January, 2018 by the Principal Secretary to the Government of West Bengal and Commissioner, Food wherein it was apparently stated that the order of termination of FPS dealership licence could be issued but fine could not be imposed, on an interpretation of the above interim order of this court.

At this point of time Mr. Bandopadhyay made a few submissions. He argued that since it was recited in the order that the appellant was a member of the association, this question being a question of fact, was finally decided at the appellate stage.

The first Appellate Authority had relinquished its jurisdiction by seeking instruction from other authorities, as to how to deal with the appeal. Thus, there was total non-application of mind and he had been acting on extraneous considerations.

The first appellate authority made an order on 17<sup>th</sup> April, 2018 affirming the order of the Sub-Divisional Controller.

Against the order of the first Appellate Court, the appellant preferred an appeal before the Director, DDP&S.

Mr. Bandopadhyay submitted that since the first appellate authority had accepted that the appellant was a member of the said association, neither the issue arose in the second appeal nor notice of such an issue being raised at the second appellate stage was given to the appellant. He also argued that when this issue of fact was decided at the first appeal stage, following ordinary principles of law the same could not have been raised by the authorities at the second appeal stage. Hence the appellant was not prepared to address any argument

and did not address any argument at that stage with regard to his membership in the association.

However a finding was entered that he was not a member of the said association on the pretext that he could not produce any document regarding his membership.

The second appellate authority made its decision on 4<sup>th</sup> July, 2018, affirming the order of the first appellate authority as follows:-

“On the other hand, weighment chart could not be prepared by the enquiring team because the FPS dealer could not make arrangement for sufficient space, larger scale and considerable number of labourers.”

*“However, on examination of case records, evidences and hearing submission of the appellant and gravity of offence from the part of the FPS dealer Sri Subhas Chandra Bhunia and as well as considering the fact that the appellant committed similar offence in 2014 also, I the Director, DDP&S being the appellate authority have come to the conclusion that the charges brought against the terminated dealer, Sri Subhas Chandra Bhunia by the DCF&S and the SCF&S concerned stand valid.*

*Hence, I find no reason to set aside the termination order dated 17.04.18 passed by the DCF&S, Pashchim Medinipur.*

*Thus the instant appeal petition is disposed of.*

*Let the copy of the order be communicated to all concerned.”*

Mr. Bandopadhyay argued that the order of the second appellate authority was without any reasons.

Mr. Bandopadhyay also submitted that the enquiry was bad, in as much as the allegation against the appellant that there was excess or shortage of stock of commodities was made without the physical verification of stock as was mandatory under the said Control Order. He also argued that there was contravention of the principles of natural justice. According to learned counsel, the second Appellate Authority also erred in holding that the respondent authorities could

not prepare the weightment chart because the appellant did not make arrangement for sufficient space and labourers.

Lastly he argued that the punishment on the appellant was disproportionate.

Mr. Sengupta, appearing for the respondent authority submitted that the said order of this court dated 29<sup>th</sup> July, 2015 did not restrain initiation of a proceeding for cancellation of an MR dealer's licence. It only said that at the material time penal action could not be taken against members of the association. He argued that the appellant had deposed before the Sub-Divisional Controller that he was not a member of the said association and that on this basis the first adjudicating authority had come to the conclusion that he did. Therefore, in the circumstances, the proceedings initiated against the appellant were valid and far from being void. Even if it was assumed that the appellant was a member of the association, he could not be affected by the adjudication order as cancellation of licence was not a penal action which involved imposition of fine only. The adjudicating authorities according to Mr. Sengupta had fixed responsibility on the appellant on the basis of his admission.

Hence, there was no infirmity in the adjudication orders.

### **DISCUSSION**

It is plainly evident that the proceedings were conducted in a most perfunctory and irregular manner. The Sub-Divisional Controller made an observation on an alleged admission by the appellant that he was not a member of the association. On appeal the appellant challenged this observation. The first appellate authority proceeded on the basis that the appellant had membership. If this was the premises on which the first appellate authority proceeded, the appellant was under no obligation to canvas his case of membership in the association, before the second appellate authority, as the respondent authorities did not prefer any appeal from this finding of the first appellate authority.

When this question of fact was not in issue in the appeal how could the second appellate authority reopen it? Even if I take a liberal view

of conduct of a quasi judicial proceeding, how could this authority decide the question without affording an opportunity to the appellant to establish his membership in the association?

In ***Suwendu Bikash Mahata Vs. District Inspector of Schools (SE), Tamluk, Midnapore and ors.*** reported in **2003 LAB.I.C. 1930**, cited by Mr. Bandopadhyay, the Supreme Court said:

*“23.It is well settled that when there is an order of stay or injunction passed by a Court, no Executive Authority can disregarding the same, exercise its power in a manner which nullifies the Court’s order. Even if a statutory power is exercised by an Executive authority disregarding the order of Court, such exercise of power apart from the contumacious in nature is also void for its illegality. This position of law has been clearly settled that by this Court and Supreme Court. [See Ashrafi Devi reported in AIR 1978 NOC 210(Cal), Clarke v. Chadburn reported in (1985) 1 All ER 211-215. Clarke was followed by Supreme Court in Skipper Corporation reported in AIR 1996 SC 2005].”*

Now, this authority would only come into play if it is shown that the order of this court made on 29<sup>th</sup> July, 2015 was binding on the said authority with regard to the appellant. It could only be so if it was established that the appellant was a member of the association when the enquiry proceedings were initiated.

An analysis and interpretation of the interim order made by this court on 29<sup>th</sup> July, 2015 in the writ application [WP 33258(W) of 2013)] with connected applications and writ applications is most necessary. The court restrained the Sub-Divisional Controllers “from taking any penal steps” against the MR dealers of the petitioner No. 1.” (i.e. the association).

The meaning of two words has to be considered. The first is ‘penal’. The following meaning is assigned to this word by the Oxford Dictionary:

“relating to or prescribing the punishment of offenders under the legal system – (of an act or offence) punishable by law.”

Black’s Law Dictionary defines penal as: “of, relating to, or being a penalty or punishment, esp. for a crime” ..... “form of punishment imposed on an individual by the authority of the state” quoting an authority.

The second word is ‘penalty’, which has been described in the following way in the Oxford dictionary:

“a punishment imposed for breaking a law, rule, or contract.”

Black describes penalty as “Punishment imposed on a wrongdoer....though usually for crimes penalty is sometimes imposed for civil wrongs.”

In **Director of Enforcement Vs. M.C.T.M Corporation Pvt. Ltd. & Ors.** reported in **(1996) 2 SCC 471**, the Supreme Court viewed penalty as an imposition for breach of “civil obligations.” It said “penalty is a word of wide significance.” “It is frequently ordered in adjudicatory proceedings.” It is different from fine “as a result of prosecution of an accused for commission of an offence in a criminal court.”

The same court in **State of U.P. & Ors. Vs. Sukhpal Singh Bal** reported in **(2005) 7 SCC 615** held that:

*"Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is*

*made the subject-matter of adjudication. The penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. Section 10(3) is enacted to protect public revenue. It is enacted as a deterrent for tax evasion.*

Penal is the adjective and penalty is the noun. “Penal steps” in our case would mean the punishment itself for violation of the rules and conditions of licence governing MR dealership. It could also include the procedure leading up to or any steps taken towards imposition of the above punishment. I do not accept Mr. Sengupta’s submission that the impugned show cause notice cum suspension order or the adjudicating order is not a penal step. Any punishment or any proceeding the result of which could be punishment is a penal step. The suspension order is certainly a penal step in my opinion.

The jurisdiction to issue the show cause cum suspension notice was only derived if the respondent authorities could show that the appellant was not a member of the association on the date of its issuance. Now, this goes to the very root of the matter. If the appellant could prove that he was a member of the association at the date of issuance of the show cause notice cum suspension order, then this procedure of initiation of proceedings by issuance of a show cause cum suspension notice could not have commenced. It would have been invalid, if not a nullity. This jurisdictional fact was not investigated in the adjudication and had to be established before any other question could be gone into by the respondent authorities.

Mr. Bandopadhyay’s allegation is that the show cause cum suspension notice was not served upon the appellant. He alleges that proceedings were drawn up against the appellant without physical verification of his stock. The second appellate authority held that copies of the enquiry report were not even sought by the appellant. Furthermore, the weighment chart could not be prepared by the team conducting the enquiry as logistic support by way of providing space, scales and labour could not be provided by the appellant.

In ***Managing Director, ECIL, Hyderabad Etc. Etc. vs. B. Karunakar Etc. Etc.*** reported in ***AIR 1994 SC 1074*** cited by Mr. Bandopadhyay, the Supreme Court laid down the following dicta:-

*“7.....The issuance of the notice to show cause against the penalty necessarily required the furnishing of a copy of the inquiry officer's report since, as held by the Courts, the right to show cause against the penalty also implied the right to represent against the findings on the charges..... The right to receive the Inquiry Officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed..... While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment.”*

Before coming to a finding that the appellant did not maintain his stock properly, it was incumbent on the respondent authority to give an opportunity to the appellant to make available the stock to the respondent authorities for physical verification.

If there was reasonable cause for an enquiry as to whether the appellant was storing an excess quantity of some commodities and whether there was shortage of other commodities and he was found to be not cooperating in the conduct of the enquiry by means of

inspection, weighment etc., then a presumption of guilt or a tentative adverse inference could immediately have been drawn against the appellant. The appellant had to rebut this presumption. But, these are questions of fact. The appellant could succeed on the principle laid down in the above Supreme Court judgment: ***Managing Director, ECIL, Hyderabad Etc. Etc. vs. B. Karunakar Etc. Etc.*** reported in ***AIR 1994 SC 1074*** only if it is shown that inspite of being ready and willing to offer inspection and weighment the respondent authority prepared an inspection report without physical verification and issued the show cause notice cum suspension order without serving a copy of the report to him. This question of fact has not been gone into by any of the three adjudicating authorities.

Next comes the findings in the order of the adjudicating authority that the appellant had “confessed” to his guilt and that on the basis of the said alleged “confession” his licence was cancelled. Here also the authorities were bound to show where and in what manner the appellant had made the admission, whether the admission was shown to him and whether he was given an opportunity of denying or explaining it.

If a finding is sought to be based on an admission made by a charged person with regard to his guilt, the alleged admission should be put forward to him, with a full opportunity to deny it or to explain it. The adjudicator is free to follow any procedure as the rules of natural justice to be followed are normally flexible in quasi judicial adjudication, of this kind. He has to ensure that there is transparency and fairness in the procedure and that the result of it is reliable or lack of reliable evidence on the basis of which he could base his findings.

This procedure has not been followed in this case.

In ***Narinder Mohan Arya vs United India Insurance Co.Ltd. & Ors.*** reported in ***(2006) 4 SCC 713*** also cited by Mr. Bandopadhyay, the Supreme Court had held that in an enquiry proceeding the rules of natural justice, which could be flexible had to be observed to ensure fair play [relying on ***Sawai Singh vs. State of Rajasthan*** reported in ***(1986) 3 SCC 454***]. If findings were recorded without any evidence the

decision was perverse as held by the Supreme Court in **Rajinder Kumar Kindra vs Delhi Administration Through Secretary (Labour) & Ors.** reported in **AIR 1984 SC 1805**.

If it is shown on a decision on this jurisdictional fact, that the appellant was not a member of the association at the material point of time, then the other questions regarding the merits of the matter could have been gone into. If he proved he was a member on the date of issuance of the show cause notice cum suspension order, the notice was liable to be revoked or cancelled. Otherwise, a full factual enquiry was necessitated.

In those circumstances all the three adjudication orders, namely, the order of the Sub-Divisional Controller, the first appellate authority and the second appellate authority are set aside.

The questions to be decided have become so important and serious that in my opinion it should be gone into and decided by the Principal Secretary of the department.

In those circumstances, the entire matter is remitted to the Principal Secretary to go into all questions as stated above in the manner also indicated above, upon giving an opportunity of hearing to the appellant, by a reasoned order within three months of communication of this order.

For the convenience of the Principal Secretary, the observations made and guidance given in the foregoing paragraphs are summarised below:-

- (1) First, there should be an adjudication as to whether the appellant was a member of the association on the date of issuance of the show cause notice cum suspension order on 8<sup>th</sup> February, 2016.
- (2) If it is found that the appellant was a member of the association, then the show cause notice cum suspension order could not have been issued to him. It ought to be cancelled or revoked. Otherwise, a full scale enquiry is required.
- (3) If it is found that he was not a member of the association, an enquiry should be made whether there was proper physical verification of his stock by the respondent authorities upon observance of the following formalities:-

- (a) proper recording of date and time of inspection;
- (b) whether the appellant discharged his duties by providing space and weighment facilities for verification of the stock;
- (c) whether a proper inventory of the stock was made?
- (d) whether a copy of the inventory along with the report was furnished to the appellant?

(4) If it is found that the respondent authorities were in breach of the above procedure, then the findings in the adjudication cannot be sustained. Otherwise, a full scale enquiry is required.

(5) If it is found that the appellant did not cooperate in the enquiry, it could reasonably be held that he was guilty of the charges with regard to excess or shortage of stock as alleged in the show cause notice, by drawing an adverse inference.

(6) The respondent authorities should be asked to produce the records whether the appellant allegedly made an admission that he was guilty of the charges. The records must be in writing. An oral account of the appellant's alleged admission regarding his guilt should not be believed. If there are no written accounts of his admission, the finding based on admission is to be immediately disbelieved and set aside. Otherwise, the admission should be considered with other proven facts.

Since, the appellant's licence stands cancelled, I am not minded to stay the cancellation order. However, no new licence for the self-same MR Dealership if not issued till date shall be issued or a selection process started by the respondent authority till the conclusion of the above adjudication process, which shall abide by the result of this adjudication.

The appeal is disposed of, accordingly.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**I agree,**

**(MD. NIZAMUDDIN, J.)**

**(I. P. MUKERJI, J.)**