

WPO No. 359 of 2020
&
WPO No. 360 of 2020
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side
M/s. Sonai Food Marketing Pvt. Ltd. & Anr.
v.
The State of West Bengal & Ors.

For the Petitioner : Mr. Kalyan Kumar Bandyopadhyay, Sr. Advocate
 Mr. Ram Anand Agarwal, Advocate
 Ms. Nibedita Pal, Advocate
 Mr. Ramesh Dhara, Advocate
 Mr. Ananda Mukherjee, Advocate

For the State : Mr. Kishore Datta, Ld. Advocate-General
 Mr. Susavan Sengupta, Advocate
 Mr. Subir Pal, Advocate

Hearing concluded on : December 3, 2020

Judgment on : December 18, 2020

DEBANGSU BASAK, J. :-

1. Two writ petitions have been heard on November 20, 2020 and December 3, 2020 and the judgment in respect thereof was reserved on December 3, 2020. Since the issues involved in the two writ petitions are same, both the writ petitions are being disposed of by this common judgment and order.

2. The petitioners have assailed the government order dated August 7, 2019 and any consequential order pursuant thereto including the order dated November 22, 2019. For the sake of convenience, the facts situation obtaining in WPO 359 of 2020 are adumbrated.

3. Learned senior advocate appearing for the petitioners has contended that, the state invited applications for filling up of the vacancies of distributorship at Minakhan Block under Basirhat subdivision in the district of North 24 Parganas by a memo dated July 11, 2018 published in the official Gazette on July 23, 2018. The first petitioner had submitted its application against such vacancy notice. By a notification dated January 9, 2019, the vacancy notice dated July 11, 2018 had been superseded. By the Gazette notification dated January 9, 2019, the date for determining the last date of application had been notified to be 30 days from the date of publication of the official Gazette or publication of advertisement in newspaper whichever is later. By letter dated January 25, 2019, the petitioners had represented that they were opting for consideration of their application under the notification dated January 9, 2019. The petitioners had received a notice dated March 11, 2019 for a spot

enquiry to be held on March 14, 2019. A spot enquiry had been held and the petitioners participated therein. The authorities, however, did not complete the selection process. Consequently, the petitioners had made a representation dated July 29, 2019 seeking to know the fate of the application. However, the petitioners had not been favoured with any response. The petitioners thereafter had moved a writ petition being W.P. No. 15260 (W) of 2019. Such writ petition had been disposed of by an order dated August 8, 2019 directing the Principal Secretary to expedite and conclude the selection process within two months. Thereafter, the petitioners had become aware of a government order dated August 7, 2019 purporting to cancel the vacancy notification. The petitioners had been forwarded with the cheque covering the application money. The Principal Secretary had passed an order dated November 22, 2019 which the petitioners had received on December 27, 2019.

4. Learned senior advocate appearing for the petitioners has drawn the attention of the Court to the contents of the order dated November 22, 2019. He has submitted that, the impugned order dated November 22, 2019 contains reasons. However, such reasons are contrary to the judgment and order dated October 9, 2020 passed by

the Division Bench in ***FMA 913 of 2020 (MAT 617 of 2020) with CAN 1 of 2020 (M/s. Kultali Food Marketing Private Limited & Anr. v. State of West Bengal & Ors.)***. He has relied upon such judgment and order of the Division Bench and submitted that, the writ petitioners applied within the time prescribed. The delay in not considering the applications of the petitioners was not attributable to the petitioners. He has submitted that, the state has not stated any cogent ground for cancellation of the selection process. The cancellation of the selection process is therefore arbitrary.

5. Learned Senior Advocate appearing for the petitioner has submitted that, the decision to cancel the process of selection had been notified on August 7, 2019. Such decision had not been brought to the notice of the Hon'ble Judge passing the Order dated August 8, 2019. The State respondents are guilty of suppression of material facts before the Court passing the Order dated August 8, 2019.

6. Learned Senior Advocate appearing for the petitioner has submitted that, even if the Court is to consider the reasons given in the impugned order dated November 22, 2019, such reasons are perverse. He has submitted that, the first two reasons given in the

impugned order are not applicable. The reason given in the impugned order that, there was delay in implementing the selection process is not available to the State as, the State was at fault in delaying completion of the selection process. The impugned order has not taken into consideration the decision of the Division Bench dated October 9, 2020. In any event, Clause 26 of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 is directory as it does not incorporate any penal consequence.

7. Learned Senior Advocate appearing for the petitioner has submitted that, the decision to cancel the selection process cannot be said to be a policy decision. The decision to cancel the selection process is arbitrary and that, the rights of the petitioner cannot be denied on the basis of such arbitrary decision.

8. Learned Advocate General appearing for the State has submitted that, the State had taken a decision to cancel the selection process. The decision to cancel the selection process is not candidate specific. The decision applies to all candidates participating in the selection process. The petitioner has not been singled out for special treatment in the decision to cancel the selection process. Therefore, no

right of the petitioner can be said to have been affected by the decision to cancel the selection process.

9. Learned Advocate General appearing for the State has submitted that, when an administrative decision is taken, the Courts are usually restrained in interfering with the same. He has submitted that, although an administrative decision can be interfered by a Constitutional Court, nonetheless in the facts of the present case, the Court need not interfere with the decision to cancel the selection process. He has submitted that, the petitioner has not alleged that, the State acted mala fide in taking the decision to cancel the selection process. The petitioner has not been victimized. As the initiator of the selection process, the State retains the right to withdraw the selection process. So long, the decision to withdraw the selection process is not directed as against the petitioner individually, no right of the petitioner can be said to be effected. The petitioner has a right to be considered fairly in the selection process. Such right has not been affected by the decision to withdraw the selection process.

10. In support of his contentions, learned Advocate General has relied upon **2007 Volume 2 Supreme Court Cases page 588**

(Ramchandra Murarilal Bhattad & Ors. v. State of Maharashtra & Ors.) and **2005 Volume 6 Supreme Court Cases page 138 (Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. & Anr.)**. He has submitted that, no relief can be granted to the petitioner.

11. In reply, learned Senior Advocate appearing for the petitioner has distinguished the authorities cited on behalf of the petitioner. According to him, the authorities cited on behalf of the State are not applicable in the facts scenario of the present case. He has submitted that, the petitioner is governed by the decision of the Division Bench dated October 9, 2020.

12. By a memo dated July 11, 2018 published in the Official Gazette on July 23, 2018, the District Controller, Food and Supplies, North 24 Parganas (hereinafter referred to as the “DCFS”) invited applications for filling up of the vacancy of the Distributorship at Minakhan Block under Basirhat Sub-Division in the District of North 24 Parganas. The petitioners had applied against such vacancy notice. The state authorities by a subsequent gazette notification dated January 9, 2019, superseded the vacancy notice dated July 11, 2018.

By the subsequent notification, the date for determination of the last date of application had been fixed at 30 days from the date of publication of the second notification in the official gazette or publication of advertisement in newspaper whichever is later. It has also specified that, persons applying under the first notification may opt for consideration of their application under the second notification by submitting an undertaking to such effect with the authorities. The petitioners had opted for considering the application under the second notification dated January 9, 2019. Apparently, the authorities had commenced the process of selection by issuing a notice dated March 11, 2019 for holding a spot enquiry. A spot enquiry so far as the petitioners were concerned, had been held. Thereafter, on the failure of the authorities to take steps the petitioners by a letter dated January 29, 2019 had sought to know the fate of their application. The petitioners did not receive any response thereto. The petitioners had filed a writ petition being W.P. No. 15260 (W) of 2019 which was disposed of by an order dated August 8, 2019 by directing the Principal Secretary to expedite and conclude the process of selection within two months. However, the authorities had issued a Government Order dated August 7, 2019 cancelling the selection process. None of

the parties to W.P. No. 15260(W) of 2019 had brought the Government Order dated August 7, 2019 to the notice of the Court passing the Order dated August 8, 2019. The authorities had also forwarded the application fees of the petitioners which the petitioners received some time in September 2019. The authorities acting in terms of the High Court's Order dated August 8, 2019 had decided the fate of the petitioners by the impugned order dated November 22, 2019.

13. ***Master Marine Services (P) Ltd. (supra)*** has considered grant of contract by the State authorities and the scope of judicial review of an administrative decision by the State. It has held as follows :-

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the

administration and lead to increased and unbudgeted expenditure.

15. *The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617] and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.”*

14. **Ramchandra Murarilal Bhattad & Ors. (supra)** has held as follows :-

“66. *In New Horizons Ltd. v. Union of India [(1995) 1 SCC 478] this Court opined that in the matter of grant of tender the State cannot act as a private person having regard to Article 14 of the Constitution of India. It was categorically opined that departing from the narrow legalistic view the courts have taken note of the realities of the situation which, by no stretch of imagination, would mean that the court would substitute itself in the place of a statutory authority. The court in a case of this nature must exercise judicial restraint. It may be one thing to say that having regard to the public interest, the court*

may itself invite bids so as to verify the justification of accepting a palpably lower bid as was done in Ram and Shyam Co. v. State of Haryana [(1985) 3 SCC 267] but it is another thing to say that the court would under all circumstances not allow a play in the joints in favour of the employer.

67. *However, if the court in a given situation is not in a position to allow a bid to take place before, it may not still venture to strike down an act in the name of public interest, although, no such public interest exists.”*

15. In order to discharge its duties and functions a State is required from time to time to enter into contracts. In the matter of contract, by virtue of Article 14 of the Constitution of India, a State and/or an instrumentality of the State cannot act as a private person. The actions of the State and/or the instrumentalities of the State in the realm of award of contracts, must conform with the principles of transparency, fair play and be free from arbitrariness, caprice, colourable exercise of power, perversity and mala fides. In the realm of contract, when the actions of the State and/or instrumentalities of the State are not tainted with mala fide, arbitrariness, colourable exercise of power or perversity, then, a decision taken by the State or the instrumentality of the State need not be interfered by the Courts. In such circumstances, the Courts allow the State a greater leeway. It

allows the State to play in the joints. In a proceeding before Court which assails the exercise of powers of the State in the award of contract, the Courts must also taken into consideration the public interest involved.

16. ***Master Marine Services (P) Ltd.*** and ***Ramchandra Murarilal Bhattad & Ors. (supra)*** have recognised that an award of a contract by the State is amenable to judicial scrutiny if it satisfies the defined parameters. If a decision of the State is tainted with arbitrariness, judicial review of such decision lies.

17. A participant in a similar selection process for distributorship in another block under the same sub-division of the same district, had filed a writ petition challenging the order of cancellation of the selection process dated August 7, 2019. Such writ petition had been dismissed by an order dated September 16, 2020. The participant as the writ petitioner had preferred an appeal against the order dated September 16, 2020 passed in such writ petition. Such appeal being ***FMA 913 of 2020 (MAT 617 of 2020) with CAN 1 of 2020 (M/s. Kultali Food Marketing Private Limited & Anr. v. State of West***

Bengal & Ors.) had been disposed of by a judgment and order dated October 9, 2020.

18. In **M/s. Kultali Food Marketing Private Limited & Anr (supra)** the Division Bench has considered the order of cancelation of the selection process dated August 7, 2019. It has held that the first two limbs of the reasons given in the impugned order dated August 7, 2019 do not apply to the facts of that case. The third limb of reason, that is, the delay was beyond the period contemplated in Clause 26 of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 was perverse. It has held that, the delay was not caused by the writ petitioner. It has also held that, the delay was not occasioned by anything that was beyond the control of the State. It has gone on to hold that, unless the State indicates cogent grounds for annulling the process, the application made by all the candidates merit consideration in accordance with law.

19. **M/s. Kultali Food Marketing Private Limited & Anr. (supra)** has considered the contention of the State that, the decision to cancel the selection process is a policy decision. It has negated such contention on the ground that, there can be no policy decision on

such score. Moreover, the order dated August 7, 2019, cancelling the selection process, does not specify that, more distributorship have opened up and therefore, the State needs to undertake a fresh selection process. It has held that, when a selection process is cancelled without adequate grounds being cited, the decision must be seen to be arbitrary, capricious and unreasonable.

20. A similar decision of cancelling the selection process for distributorship has been the subject matter of ***M/s. Kultali Food Marketing Private Limited & Anr. (supra)***. Such decision has been struck down by the Division Bench. The petitioners herein are similarly situated and circumstanced as that of the petitioners in ***M/s. Kultali Food Marketing Private Limited & Anr. (Supra)*** excepting that, the petitioners herein have suffered an additional order dated November 22, 2019 deciding the fate of the petitioners.

21. The order dated November 22, 2019 has been passed acting on the order dated August 8, 2019 passed by the High Court in the first writ petition of the petitioners. The order dated November 22, 2019 has taken note of the declaration of the vacancy, the initiation of the selection process, the conduct of the parties and the ultimate

cancellation of the selection process. It has noted that, approval and cancellation of a vacancy is within the realm of valid decision by the State and that such decision is not in contravention of any law. It has opined that, the State did not act with any mala fide intention or attempt to infringe upon any fundamental or legal right of the petitioners.

22. The impugned order dated November 22, 2019 has based its reasons on the order dated August 7, 2019. The order dated August 7, 2019 has been held to be arbitrary in ***M/s. Kultali Food Marketing Private Limited & Anr. (Supra)***. The reasoning of the impugned order dated November 22, 2019 cannot be accepted in view of ***M/s. Kultali Food Marketing Private Limited & Anr. (Supra)***.

23. In such circumstances, the writ petitions are allowed. The writ petitioners being similarly situated and circumstanced as that of the writ petitioners in ***M/s. Kultali Food Marketing Private Limited & Anr. (Supra)*** same reliefs have to be granted. The respondent authorities will process the applications of the petitioners for engagement of MR Distributor in the respective blocks applied for in

accordance with law and communicate their decision within six weeks from date.

24. W.P.O. 359 of 2020 and W.P.O. 360 of 2020 are disposed of accordingly without any order as to costs.

[DEBANGSU BASAK, J.]