

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

PRESENT:

HON'BLE MR. JUSTICE ABHIJIT GANGOPADHYAY

WPA 4928 of 2021

M/s. Sonai Food Marketing Pvt. Ltd. & Anr.

-Versus-

The State of West Bengal & Ors.

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

For the State : Mr. Kishore Dutta, Ld. Advocate-General
Mr. Sushovan Sengupta,
Mr. Subir Pal,

Heard on : 23.02.2021, 25.02.2021 & 26.02.2021

Judgment on : 30.04.2021

Abhijit Gangopadhyay, J .:

1. This writ application is directed against an order dated 28th January, 2021 issued by the District Controller, Food & Supplies, Purba Bardhaman, whereby the application of the petitioners dated 20.08.2018 was rejected. The application dated 20.08.2018 was for Distributorship licence of public

distribution commodities to the Fair Price Shops under the Public Distribution System.

2. For filling up vacancy of Distributorship under the West Bengal Public Distribution System (Maintenance & Control) order, 2013 (2013 Control Order, hereafter) in an area namely Surekalna, Jamalpur Block, in the District of Purba Bardhaman, office of the District Controller of Food & Supplies Department, Purba Bardhaman had published one notification dated 12.07.2018 (published in the Kolkata gazette dated July 23, 2018) relevant part of which was as follows :

“In pursuance of the approval of the Government in Food & Supplies Department, applications are invited from intending Self Help Groups/Registered Co-operative Societies/ Semi- Government bodies/ individuals/group of individuals as an entity for filling up the vacancy of distributorship in terms of clause 26(i) of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 in Surekalna, Jamalpur Block in the district of Purba Bardhaman”.

3. The notification dated 12.07.2018 was superseded by a subsequent notification issued by the same office dated 03.01.2019. The first and third paragraph of the subsequent notification dated 03.01.2019 (published in the Kolkata Gazette on January 09, 2019) are required to be reproduced:

“Whereas in pursuance of the approval of the Government in Food & Supplies Department, applications were invited from intending Self Help Groups/Registered Co-operative Societies/ Semi-Government bodies/individuals/group of individuals as an entity for filling up the vacancy of

distributorship in terms of clause 26(i) of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 in Surekalna, Jamalpur Block in the district of Purba Bardhaman vide notification No.1517/DCF&S/EBDN/M.R/18 Dated 12.07.2018”.

... ..

“Now, therefore, it is notified for the general public that in supersession of the principal notification, application is invited from intending Self Help Groups/Registered Co-operative Societies/ Semi-Government bodies/individuals/group of individuals as an entity for filling up the vacancy of distributorship in terms of clause 26(i) of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 in Surekalna, Jamalpur Block in the district of Purba Bardhaman in prescribed proforma (Form G) along with other requisite documents and Treasury Challan (showing deposit of requisite application fee) to be submitted in a sealed cover, superscribed “Appliction for engagement as Distributor in Surekalna, Jamalpur Block, in the district of Purba Bardhaman” to the office of the District Controller, food & Supplies, Purba Bardhaman during working hours on

any working day within 30(thirty)days from the date of publication of the notification”.

4. In the said subsequent notification dated 03.01.2019 it was specified that the applicants who had applied earlier on the basis of the principal notification (i.e. notification dated 10.07.2018) might opt to consider their application under the subsequent notification on submission of an undertaking by them to the concerned District Controller, Food & Supplies within the last date of submission of application.
5. The petitioner's case is that in response to first notification (i.e. the principal notification) dated 17.07.2018 they applied for the vacancy in Surekalna, Jamalpur Block, in the district of Purba Bardhaman and in terms of the subsequent notification dated 03.01.2019 submitted the undertaking.
6. As there was delay in processing their application they filed writ application being WPO No. 360 of 2020 and in compliance with the order of this Court in the said writ application their application had been considered by the concerned authority and was rejected due to non-fulfilment of certain criteria. The three reasons disclosed for such rejection of the application of the petitioner are as follows :

“ i) As per application submitted, M/S Sonai Food Marketing Pvt. Ltd. has its registered office at 24/1, Bethune Row, Kolkata- 700 006. No paper has been submitted to prove the existence of any office of M/S Sonai Food Marketing Pvt. Ltd. in Purba Bardhaman District. Further. Mr. Tamal Kundu, Managing Director and Authorized Signatory of said company has submitted copy of his Aadhaar Card (bearing no. 6100 7194 6886) in which his address is recorded as 40/A, W.C. Banerjee Street Kolkata-700 006.

This violates the eligibility criteria mentioned at Sl. No. 2 that “the applicant (in the case of individuals or group of individuals) should be permanent resident(s) of Purba Bardhaman district”.

ii) The applicant is a company. However, applications were invited only from Self Help Groups/Registered Co-operative Societies/Semi-Government Bodies/Individuals/Group of Individuals as an entity. Thus the applicant is found not eligible to apply for MR Distributorship vacancy as per the instant notification.

iii) The proposed godown failed to conform to the CWC norms owing to absence of the top ventilation and having little ancillary facility as required in eligibility criteria No. 6 of the instant vacancy notification”.

7. This rejection has been challenged in this writ application by the petitioners on the ground that those are wholly unreasonable and inconsistent with the 2013 Control Order.
8. The petitioners harped on the second reason of rejection which says that applications were invited only from self help groups etc. but the petitioner No. 1/applicant was a company and as applications were not invited from any company, the application of the petitioner was rejected. The petitioner made submissions that a company comes within the meaning of the expression “group of individuals as an entity” and therefore, a company was also eligible to apply for the distributorship and rejection of its application for it being a company is illegal.
9. In reply the respondent has submitted that there was no illegality in rejecting the application of the petitioner as a company does not come

within the meaning of “group of individuals as an entity”. The respondent further submitted that exclusion of company from the eligibility criteria was a conscious decision and if the Government wanted to include company as eligible for making application for distributorship it could say so but when it has not been said the only irresistible conclusion is companies are not eligible to apply for the distributorship.

- 10.** It has been noted that the 2013 Control Order has been amended by notification No. 3537 dated 18th December, 2018 (published in the Kolkata gazette on even date). By such amendment in clause 26 of the 2013 Control Order, inter alia, sub-Clause (iia) was inserted for inviting application (for distributorship) from

- (i) Self Help Groups
- (ii) Registered Co-operative Societies
- (iii) Semi-Government bodies
- (iv) individuals
- (v) group of individuals as an entity

Specifying the eligibility criteria etc. both for ‘resultant vacancy’ and for ‘new vacancy’. Before such amendment of 2013 Control Order in 2018 for ‘resultant vacancies’ it was not mentioned from whom the applications were to be invited though for ‘new vacancies’ the above persons were mentioned in clause 26(iii) of the 2013 Control Order.

- 11.** Here the controversy starts. The petitioner submits that as a Company is included within the meaning of the expression “group of individuals as an entity” the word company need not be specified separately in 2013 Control Order by 2018 amendment or otherwise.

In support of such submission the petitioner has relied upon a judgment reported in AIR 1963 SC 1811 (State Trading Corporation of India Limited -versus- Commercial Tax Officer & Ors). Referring to paragraphs 29 thereof the petitioner has submitted that in the said Larger Bench judgment it has been stated that:

“...an incorporated company has a separate existence and the law recognizes it

as a legal person separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity”

To show that a company is a group of individuals as an entity the petitioner has relied upon another Supreme Court judgment reported in (2012) 6 SCC 613 (Vodafone International Holdings -versus- Union of India & Anr). Referring to paragraph 71 thereof the petitioner submitted that the enunciation of Pope Innocent IV is the foundation of the separate entity principle in the 13th century. This theory of legal fiction of ‘separate entity’ was espoused by Pope Innocent IV.

Referring to another judgment of Supreme Court reported in (2018) 9 SCC 537 (paragraphs 23 and 24) the petitioner submitted that there is no impediment in considering a company even if it is a transferred entity from a proprietorship firm.

The separate entity principle has been emphasised again by the petitioner by referring to paragraph 15 of another Supreme Court judgment reported in (1999) 4 SCC 458.

Finally the petitioner submits that this rejection of the petitioner’s application by the impugned letter is clearly a discrimination. To define what is discrimination the petitioner has referred to Supreme Court judgment reported in (2011) 7 SCC 639 (State of Madhya Pradesh & Anr. -versus- Narmada Bachao Andolan), here Supreme Court has stated, (in paragraph 73) that

“discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination that arises from oversight which the state is really to rectify”.

Referring to this judgment the petitioner submits that the order of rejection dated 28.01.2021 especially the second paragraph thereof suffers from each and every vices that has been mentioned in the above observation of the Supreme Court.

- 12.** In reply the Learned Advocate General has relied upon two judgments one reported in (2004) 1 SCC 712 (paragraph 30) which says that right of a Company cannot be equated with the fundamental right of its members and has submitted that the decision of Narmada Bachao Andolan case cannot be applied here as it is not the case of the petitioners that some other company's application has been accepted whereas the petitioner company's application has been rejected. Thus there is no case of discrimination.

Relying upon the other judgment reported in (1995) 1 SCC 678 (paragraph 27) the Learned Advocate General submitted when a corporation is regarded as an association of persons. Referring to the well known case of United States (US -versus- Milwaukee) and approval of the principle laid down there by our Supreme Court in the said judgment, Learned Advocate General has submitted that a corporation is viewed as an association of

persons when the legal entity namely 'company' is used to defeat public convenience, used to justify wrong, used to protect fraud or used to defend crime.

Here reading 'company' within the meaning of "group of individuals as an entity" does not arise as 'company' is not in the context considered as an association of persons and therefore, in no way it can be said that in the context of this 2013 Control Order (as amended in 2018) a Company is to be included within the meaning of 'group of individuals as an entity'.

13. After considering the submissions of the parties, the pleading and the judgments cited from the bar, I express my view in the following way:

- (i)** If 'company' is included within the expression "group of individuals as an entity" a special (or technical) meaning of the said expression is to be understood beside understanding the expression in its ordinary or natural meaning. Does the context or the intentions of the framers of the 2013 Control Order support the special "or technical" meaning also while understanding the said expression? Is the said expression is to be understood as having special (or technical) meaning in the realm of the 2013 Control Order which includes 'company'? Was the amendment of 2018 (of the 2013 Control Order) made with regard to the particular trade of Distribution of Public distribution Commodities to include company in the expression "group of individuals as an entity"? Was everybody conversant with that trade knew and understood the special (or technical) meaning in the said expression which includes company?

We have to find out the replies to the questions.

- (ii)** It is to be kept in mind that before 2018 amendment of 2013 Control Order the expression "group of individuals as an entity" was there in the said Control Order in respect of eligibility of the persons who could apply in the 'new vacancies' under Clause 26 (ii). It has not been shown before this court that before 2018

amendment of 2013 Control Order the expression “group of individuals as an entity” was understood by the persons concerned with the trade of Essential Commodities as inclusive of the special (or technical) meaning i.e. in the said expression ‘Company’ was included.

The expression “group of individuals as an entity” was there in 2013 Control Order (for filing up ‘new vacancies’) and it is not the case of the petitioners that the above expression for the first time appeared in the 2013 Control Order after amendment made in 2018. By 2018 amendment the expression was also made applicable for applications for ‘resultant vacancies’. Thus the expression “group of individuals as an entity” was known in the trade since 2013.

It has not been shown to this court by the petitioner that from 2013 in respect of this particular trade relating to Public Distribution Commodities, the said expression was inclusive of ‘company’.

Therefore, I hold that in the context of the 2013 Control Order in respect of supply and distribution of Public distribution Commodities ‘company’ was not considered within the meaning of the said expression and the expression was always understood by the persons involved with the trade in its ordinary or natural meaning and not in its special (or technical) meaning.

- (iii)** In the above referred State Trading Corporation case (AIR 1963 SC 1811), which has been relied upon by the petitioners the context was completely different while describing the characteristics of ‘company’. There, the context was enforcement of Article 19 of the Constitution of India by a Company as an entity consisting of individuals who have the right to enforce Article 19 of the Constitution. In that case Supreme Court held, though the individuals being members of a company have Fundamental Rights

under Article 19, the separate entity formed by individuals by incorporation cannot have right to enforce Fundamental Rights under Article 19 of the Constitution of India. The context of holding a Company as an entity in that case and the context of the present situation as to being “a group of individuals as an entity” for making application for distributorship of public Distribution Commodities are wholly different. Being contextually different the observation of the above case made by the Supreme Court cannot be applied here.

- (iv)** The intention of the framers of the 2013 Control Order (which has the force of law) is also clear. They did not want to included the word ‘company’ within the expression “group of individuals as an entity” which I hold a conscious omission of the framers of the 2013 Control Order including its amendment in 2018. The framers has in front of them the definition of ‘distributor’ under 2013 Control Order as has been defined Clause 2 (j) of the said Control Order which definition includes ‘company’ and despite having it in front of them the framers did not include the word ‘company’ within the expression “group of individuals as an entity”. This is clearly a conscious decision which shows the intention that companies would not be allowed to apply for distributorship of Public Distribution Commodities. What has not been included directly by the framers in the said expression, cannot be held by this court as included indirectly in the said expression.
- (v)** It is evident from the above discussion that the context shows that the framers of the 2013 Control Order (including its amendment in 2018) intended to use the expression “group of individuals as an entity” in its literal sense and not in its legal, special or technical sense.

Thus we get the answers to the questions framed above.

14. For the reasons as aforesaid I dismiss the writ application, however, without any costs.

As affidavits were not called for as the parties agreed that the matter be heard finally the allegation made in the writ applications are deemed not to have been admitted.

(Abhijit Gangopadhyay, J)