IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

HON'BLE JUSTICE SUBRATA TALUKDAR
AND
HON'BLE JUSTICE SAUGATA BHATTACHARYYA

M.A.T. 562 of 2021
With
CAN 1 of 2021

M/s. Sonai Food Marketing Pvt. Ltd & Anr.
vs.
State of West Bengal & Ors.

For the Appellants	:	Mr. Kalyan Bandopadhyay Mr. Ram Anand Agarwal Ms. Nibedita Pal Mr. Ramesh Dhara Mr. Ananda Gopal Mukherjee
For the State	:	Mr. Susovan Sengupta
Heard on	:	30/07/2021
Judgment on	:	26/08/2021

Subrata Talukdar, J.:

Under challenge in this appeal is the Judgement and Order of the Hon'ble Single Bench passed in the writ petition numbered as WPA 4928 of 2021 dated the 30th of April 2021. The Appellants/ the Company was the writ petitioner. The issue before the Hon'ble Single Bench, which is also the issue in this appeal, relates to whether the Appellant/ the Company fulfills the eligibility criteria to apply for a MR distributorship in Jamalpur Block, District Purba Barddhaman under the Notification of the Food and Supplies Department which has permitted *Self-Help Groups (SHG)/ Registered Cooperative Societies/ Semi Government bodies/individuals/ group of individuals as an entity* to be eligible to apply.

The State took the position that the writ petitioner/ the Appellant/ the Company does not qualify to be a *group of individuals as an entity* and hence is disqualified from applying for the said MR Distributorship. The State respondents relied on a communication of the District Controller, Food & Supplies (F&S), Purba Barddhaman addressed to the Director of the Appellant/ the Company which purports to disqualify the Appellant/ the Company from applying on the ground that the company cannot be treated to be in the nature of a *group of individuals as an entity*.

The Hon'ble Single Bench *vide* its Judgement and Order dated the 30th of April 2021 agreed with the stand taken by the State respondents, *inter alia*, holding that the expression *group of individuals as an entity* used in the West Bengal Public Distribution System (Maintenance and Control) Order, 2013 (for short referred to as the *2013 Control Order*) was intended to be applied in its literal sense and not in its legal, special or technical sense. The Hon'ble Single Bench held that since the word *Company* was deliberately not used in the *2013*

Control Order, it cannot be used in favour of the appellants for bringing the Company into the zone of consideration. When the expression *group of individuals as an entity* is read in its natural or ordinary sense, according to the Hon'ble Single Bench, the Appellant/ the Company stood automatically debarred from applying.

Thus, the only question which has been tossed back and forth in this appeal is the construction of the expression *group of individuals as an entity.* While Mr. Kalyan Bandopadhyay, Learned Senior Counsel appearing for the Appellant/ the Company, would assert that when a group of individuals is configured to be an entity, the Appellant/ the Company would qualify to be considered as an entity in the juristic sense, on the other hand, Mr. Susovan Sengupta, Learned Senior Government Advocate, would assert that the eligibility criteria of a *group of individuals as an entity* would only apply to natural persons and not to artificial persons such as the Appellant/ the Company.

The essential arguments addressed by Mr. Bandopadhyay may be summarised as follows :-

a) That it is beyond doubt that the Appellant/ the Company is a juristic entity registered by a specific group of individuals acting as its shareholders and Directors. Such position has been legally cemented by the authority of decisions of the Hon'ble

Supreme Court reported in *AIR 1963 SC 1811 (* at paragraph 29*) and 2012 (2) SCC 89 (*at paragraphs 31 to 35*)*

b) If other legal entities such as Registered Co-operative Societies, Self-Help Groups and Semi-Government bodies can be treated to be eligible to apply, the same treatment must be extended to the Appellant/ the Company. It is beyond lawful comprehension that legal entities such as registered co-operative societies, Semi-Government bodies and Self-Help Groups would be treated as natural persons or an assembly of natural persons whereas the appellant/ the Company would be treated as an artificial person.

c) Therefore, the *2013 Control Order* cannot be construed to bar the Appellant/ the Company from applying and, the expression *group of individuals as an entity,* has been deliberately misconstrued by the communication of the District Controller (F&S), Purba Barddhaman, dated 28th of June 2021 (*supra*) with the intention of discriminating against the Appellant/ the Company.

d) Referring to the Notification published for grant of the said MR Distributorship dated the 12th of July 2018, Mr. Bandopadhyay submits that the fulfillment of the eligibility criteria of an applicant requiring such applicant to be a citizen of India and a permanent resident of the concerned District stands confined only to those applicants who are applying individually. Norms of citizenship and permanent residence cannot, by any stretch of imagination, apply to a legal entity such as Registered Co-operative Societies, Semi-Government bodies or Self-Help Groups and equally excludes the Appellant/ the Company being a juristic entity.

e) Taking this Court to two back-to-back orders of the Hon'ble Single Bench dated the 8th of August 2019 in WP 15409 (W) of 2019 and the 18th of December 2020 in WPO 359 of 2020 with WPO 360 of 2020, Mr. Bandopadhyay submits that in none of the said two orders, the Appellant/ the Company was excluded at the threshold from applying.

f) By the first order dated the 8th of August 2019, the Hon'ble Single Bench directed the Principal Secretary (F&S) Government of West Bengal to expedite and conclude the process of selection of the MR Distributorship within the specific period mentioned in the order.

g) The directions in the order dated 8th of August 2019 (*supra*) culminated in an order of the Principal Secretary (F&S) dated the 2nd of November 2019. The order dated 2nd of November 2019 had, *inter alia,* granted liberty to the Appellant/ the Company to apply afresh against any vacancy which may be notified by the Department in future since, on matters of policy, the earlier vacancy Notifications were sought to be substituted. Therefore, Leaned Senior Counsel for the appellants submits that the reasoned order dated 22nd November 2019 does not at all preclude the Appellant/ the Company from applying.

h) Next, referring to the Judgement and Order dated 18th December 2020, Learned Senior Counsel points out that the Hon'ble Single Bench found the reasons stated in the order of the Principal Secretary (F&S) dated 22nd of November 2019 to be unacceptable since such reasons were *apropo* a previous order dated 17th of August 2019 which was held to be arbitrary by the Hon'ble Division Bench in FMA 913 of 2020 (MAT 617 of 2020) with CAN 1 of 2020 in the matter of M/s. Kultali Food Marketing Limited and another Vs. State of West Bengal and others. The Hon'ble Division Bench by a Judgement and Order dated 9th of October 2020 had struck down the refusal on the part of the concerned respondent authority to grant distributorship in favour of M/s. Kultali Food Marketing Limited. Therefore, the Hon'ble Division Bench in its Judgement and Order dated 18th December 2020 held that the present Appellant/ the Company being similarly circumstanced as M/s. Kultali Food Marketing Pvt. Limited, directed the State respondents to process the application of the present appellants for engagement as MR distributors.

i) Mr. Bandopadhyay thus submits that the order of the District Controller (F&S) Purba Barddhaman dated the 28th of January 2021 has now come up with a new reason to disqualify the Appellant/ the Company with a view to frustrate the back-to-back solemn orders of the two Hon'ble Single Benches dated the 8th of August 2019 and the 18th of December 2020. It is also submitted that the Hon'ble Single Bench *vide* the Judgement and Order dated 30th of April 2021 impugned in this appeal accepted a novel reasoning of the State respondents which falls foul of the two judicial orders (supra), as well as the ultimate intention *vide* the order of the Principal Secretary (F&S) dated the 2nd of November 2019 granting absolute liberty to the present Appellant/ the Company to apply afresh against any vacancy.

j) It is submitted that if M/s. Kultali Food Marketing Limited, being a registered company, can be granted a licence to apply for a MR Distributorship as held by the order dated 18th of December 2020, the present Appellant/ the Company is equally entitled to apply for the said MR Distributorship. It is submitted that the definition of a Distributorship under Clause-2 of the *2013 Control Order* does not exclude the Appellant/ the Company from applying in terms of *Form-G* of the *2013 Control Order.*

k) It is further submitted that the Appellant/ the Company was not held to be excluded by the conditions attached to *Form-G* (*supra*). Even an enquiry held by the relevant Sub-Divisional Controller (F&S), Purba Barddhaman at the godown premises of the Appellant/ the Company, no defects connected to the eligibility particulars furnished by the Appellant/ the Company were found.

l) Therefore, Mr. Bandopadhyay points out that the reason offered for rejection of the candidature of the Appellant/ the Company *vide* the order of the District Controller (F&S) dated 28th of January 2021 is rather unique. Such reasoning has been erroneously upheld by the Hon'ble Single Bench by placing emphasis on a literal/ natural/ ordinary construction of the expression *group of individuals as an entity.* On the contrary, the emphasis ought to have been placed on a purposive interpretation/ construction of the expression since the intention of the Notification inviting applications was to attract the best possible agency and not to arbitrarily discriminate and exclude the Appellant/ the Company from applying. In support of his arguments of the non-discriminatory role to be played by the State respondents in matters of State contracts, reliance is placed by Learned Senior Counsel on the authority of *2011 (7) SCC 639* (at Paragraphs 71, 72 and 73).

m) It is submitted that the micro-classification in matters connected to State awarded contracts which bears no rational nexus to the object of the Notification for award of MR Distributorship requires to be struck down as both irrational and unconscionable. In the absence of a nexus which can justify the exclusion of the Appellant/ the Company for grant of the said MR Distributorship, this appeal must succeed and the Appellant/ the Company should be declared eligible to apply.

Per contra, Mr. Susovan Sengupta, Learned Senior Government Advocate, submits that no challenge has been thrown by the Appellants/the Company to the Notification inviting applications as being inconsistent with Article 14 of the Constitution of India. The Appellants/the Company were free to apply on the basis of the criteria laid down. The orders dated 8th of August, 2019 and 20th of December, 2020 do not bar the notifying F&S Authority from treating *a group of individuals as an entity* as not to be in the nature of a Company.

It is submitted that the tender was intended to be confined to *natural persons as distinguished from artificial persons*. The conditions in the tender relating to citizenship and permanent residence of the applicants clarified the position further that such conditions would apply to only natural persons aggregating as a group of individuals. It is submitted that the Company was deliberately left out of the ambit of the Notification inviting applications. Accordingly, there could be no question of including the concept of a company as a registered juristic entity distinct from a group of individuals to be included within the scope of the tender.

The Company being in the nature of a single registered juristic entity was eligible to participate in tenders prior to the coming into force of the *2013 Control Order.* However, the concept of a company eligible to participate as a single registered juristic entity was omitted altogether. Instead, the Notification in issue used the expression *group of individuals as an entity* or, in other words, *acting as an entity* comprising natural persons eligible to participate in the tender.

Mr. Sengupta asserts that by throwing open the tender to natural persons as distinguished from artificial persons, the scope of participation in the tender was sought to be given a more equitable mode. The State Respondents, by doing so, are seeking to create greater personal accountability in the area of allotment of MR distributorships. Not only natural persons can be held to be more accountable, by doing so, the State has endeavored to offer the opportunity to participate in the tender to a larger segment of the population. The State has also sought to eliminate the stranglehold of powerful companies such as the Appellants/the Company who were hitherto monopolising MR distributorships. Taking this Court to the definition of a company as understood in law, it is submitted that a Company cannot be a citizen of India nor enjoy a permanent residential address. However, both the criteria of citizenship and permanent residence would apply to a natural aggregation of a group of individuals.

It is submitted that none of the conditions incorporated in the tender Notification are inconsistent with the *2013 Control Order* which has statutory flavour. By way of amplifying the facts connected to his arguments, Mr. Sengupta relies on statistics compiled by way of a Chart with copies served on the Learned Advocates for the Appellants/the Company. The Chart, *inter alia*, purports to show that several eligible *groups of individuals as an entity* were found qualified to apply.

Learned State Counsel relies on the authority of *AIR 1963 SC 1811* at Paragraph 29 to demonstrate the distinction between a Company registered as an artificial juristic entity and a group of individuals collaborating as a natural entity.

Having heard the parties and considering the materials placed, this Court arrives at the following findings:-

I) First, the back-to-back orders of the two Hon'ble Single Benches respectively dated the 8th of August, 2019 and the 20th of December, 2020 adequately underscore the position that the Appellants/the Company is entitled to apply against vacancies for MR distributorships. Taking the second order dated 20th December, 2020 first, this Court finds that it is no more *res integra* that the Appellants/the Company shall be treated on an equal footing with another similar registered juristic entity namely, M/s. Kultali Food Marketing Ltd.

It is not in dispute that M/s. Kultali Food Marketing Ltd. is already operating on the basis of a licence for running a MR Distributorship. Therefore, the order dated 20th December, 2020 having attained finality with M/s. Kultali Food (supra) is already holding a licence of MR Distributorship on such basis, there is no reason why the Appellants/the Company should be denied equal status being on the same legal footing.

II) Next, turning to the first order dated 8th of August, 2019 directing the Principal Secretary (F&S) to take the selection process to a logical conclusion, this Court has already taken notice of the fact that the Principal Secretary (F&S) had permitted the Appellants/the Company to apply afresh against any vacancy, meaning thereby that, the restrictions on applying as imposed by the communication dated 28th January, 2021 amounts to unreasonable curtailment of the liberty granted (supra) by the Principal Secretary (F&S) pursuant to an order of Court.

III) It must be also noticed that in the said order of the Principal Secretary (F&S) dated 22nd November, 2019, it was, *inter alia*, observed as follows:-

> *"(ii) Norms and Specifications of godowns; (iii) number of Cards to be tagged with the Distributor, etc. After detailed examination, the State Govt. in Food & Supplies Dept. had*

> *taken a policy decision to cancel all these MR distributor vacancy notifications and had decided to notify these vacancies denovo after adopting revised norms and guidelines regarding financial solvency and godown specifications afresh and public interest. Accordingly, the Department had issued a GO vide No. 3316-FM/Sect/Sup/4M-33/2019 dated 07.08.2019 with a direction to the concerned DCF&S to cancel the vacancy notification(s) of distributors."*

IV) It was again observed by the said order of dated 22nd November, 2019 as follows:-

> *"Approval and cancellation of vacancy is within the realm of policy decision by the State Government and is not in contravention of any law Statute. The State Government has taken a general decision to cancel all the 35 vacancies for which advertisement had been published. The said decision was made in public interest for a number of reasons concerning matters of policy and was in no way aimed at prejudicing the petitioner alone. Therefore no mala fide intention, or any attempt to infringe upon the fundamental rights or other rights of the petitioner or any other person can at all be deduced."*

V) From a collective interpretation of the reasons disclosed in the order dated 22nd November, 2019 (supra), this Court does not find any restraint on entities recognized by law to be ineligible to apply for a MR Distributorship. It was only contemplated that the vacancies of MR Distributorship were to be notified following the norms of *financial solvency* and godown specifications in *public interest.*

It is not the case of the State Respondents that the Appellants/the Company has failed to meet the policy specifications norms set forth in public interest. To the mind of this Court, the exclusion of the Appellants/ the Company by way of a novel logic disclosed in the communication dated 28th January, 2021 and reiterated in the arguments of the State Respondents, goes against the very grain of the observations made by the Principal Secretary, F&S that there was no *mala fide* intention to curtail the rights of the Appellants/the Company to apply for a MR Distributorship.

VI) Although, it is an admitted position available from the record that the order of the Principal Secretary (F&S) dated 22nd November, 2019 stood set aside by the judgment and order dated 20th December, 2020 on the basis of a different line of reasoning pertaining to the arbitrary exclusion of M/s. Kultali Food Marketing Limited from the zone of consideration, the consistent holistic interpretation of the two judicial orders dated 8th August, 2019 and 20th December, 2020 keeping the single administrative order dated 22nd November, 2019 in context, is that the Appellants/the Company could not be excluded from the zone of consideration of eligible applicants for the MR Distributorship.

VII) Additionally this Court finds the rationale behind the stand of the State Respondents that a distinction is to be drawn between natural and artificial persons in a tender relating to grant of MR distributorships to be an ambitious legal exercise. The objective of the tender policy was to find out the best bid on the platform of financial solvency, godown space and relevant parameters. Therefore, the State is duty bound to seek out the most eligible candidates for the MR Distributorship. That Judicial Review in tender matters may be restricted but, not excluded, finds trite expression at Paragraph 11 of *In Re: Monarch Infrastructure (P) Ltd. Versus Commissioner, Ulhasnagar Municipal Corporation and Others, (2000) 5 SCC 287* which, reads as follows*:*

> *"11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide. "*

VIII) It is hence incomprehensible that tender specifications should be designed in a manner construing *a group of individuals as an entity* as limited to eliminating the Appellants/the Company. It is equally incomprehensible that the construction of the expression *a group of individuals as an entity* has been argued as limited to natural persons whereas the legal *grundnorm* persuades this Court to hold otherwise by purposively interpreting the expression to include within its scope, ambit and meaning juristic entities constituted by a group of individuals. To the mind of this Court such a condition in the tender stands out to be *ex facie* discriminatory and since such a tender condition fails to provide a level playing field, the exclusion of the Appellants/the Company is liable to be struck down.

IX) It is also difficult for this Court to appreciate the concept of *a group of individuals as an entity* restricted only to a fluid aggregation of so-called *natural persons.* To the mind of this Court, the expression *group of individuals as an entity* or, in other words, *acting as an entity* could also relate to a juristic entity such as the Company formed out of a group of individuals being its promoters, shareholders and Directors.

X) In the event, the expression *natural persons* is to be applied to the tender notice, it must be applied across the board to the other categories of applicants such as Registered Co-Operative Societies/Self Help Groups and Semi-Government Bodies which, by their very own configuration, are ineligible to be treated as *natural persons*. Carrying the above discussion further, this Court is left in doubt whether the meaning given to *group of individuals as an entity* by the communication dated 28th January, 2021 although not so appearing from the Notification itself, could be designed to act in a particular manner to eliminate the Appellants/the Company from applying at the threshold itself and, the Hon'ble Single Bench, with respect, could have perceived that

> the so called literal/ordinary meaning of the expression *group of individuals as an entity* is not a legal contextual meaning at all. Since, the so-called literal/ordinary meaning carries no legal context at all having regard to the present facts and circumstances, this Court must resort to a purposeful construction which must negate such legal absurdity.

In the backdrop of the above discussion, the order impugned of the Hon'ble Single Bench stands set aside.

The application for MR Distributorship of the Appellants/the Company shall be now processed in accordance with law.

There shall be no order as to costs.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Saugata Bhattacharyya, J.) **(Subrata Talukdar, J.)**

26.08.2021

Later:

After pronouncement of this Judgement and Order, Mr. Sengupta, Learned State Counsel, prays for stay of operation of the Order.

The prayer for stay is opposed by Learned Counsel for the Appellants/the Company.

Heard.

Considered.

The prayer for stay stands rejected.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Saugata Bhattacharyya, J.) **(Subrata Talukdar, J.)**