

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

Present :- Hon'ble Justice Amrita Sinha

WPA No. 11518 of 2021

Smt. Durga Das

Vs.

State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Debabrata Saha Roy, Adv. Mr. Pingal Bhattacharyya, Adv. Mr. Subhankar Das, Adv. Mr. Neil Basu, Adv.
For the State	:-	Mr. Anirban Ray, Adv. G.P Mr. Sushovan Sengupta, Adv. Mr. Subir Pal, Adv. Mr. Sayak Chakraborty, Adv.
Hearing concluded on	:-	06.08.2021
Judgment on	:-	02.09.2021

Amrita Sinha, J.:-

The order dated 5th July, 2021 issued by the Director of Rationing, West Bengal rejecting the prayer of the petitioner for engaging her as dealer on compassionate ground is under challenge in the instant writ petition.

The rejection was on the ground that the petitioner being the sister of the deceased dealer does not fall within the purview of the definition 'family members'.

The brief facts of the case are as follow:

The father of the petitioner was a licensee in respect of a Fair Price Shop previously known as AR Shop. License was issued to her father in the year 1951. After the demise of her father the license was issued in favour of her mother, that is, in favour of the widow of the licensee in 1971. Due to the advanced age of her

mother an application was made for transferring the license in favour of her brother, that is, the son of the licensee. License was issued in favour of the brother of the petitioner on 15th February, 2005 and since then the brother of the petitioner continued with the family business. The brother of the petitioner, that is, the licensee was a bachelor. He was a victim of Covid-19 and died on 1st October, 2020 leaving behind three unmarried sisters including the petitioner, two married sisters and one unmarried brother as his heirs and legal representatives.

Presently the immediate family members of the petitioner comprise of three unmarried sisters including the petitioner and one unmarried brother. The entire family was dependent upon the income from the Fair Price Shop which was run by her brother till his death. The petitioner has averred in the writ petition that apart from the Fair Price Shop there is no other source of income of the family.

To save the family from the financial crisis faced on account of death of her brother, the petitioner, on 15th October, 2020, made an application before the Director of Rationing for grant of Fair Price Shop dealership license in her favour on compassionate ground. The said application was made within the stipulated period as prescribed under the West Bengal Public Distribution System (Maintenance and Control) Order, 2013 as amended, hereinafter referred to as the 'Control Order, 2013' for the sake of brevity. The application was forwarded along with all the necessary documents in the prescribed form and the application fees. All the other legal heirs of the deceased licensee issued No Objection Certificate in favour of the petitioner.

The prayer of the petitioner was rejected by the Director of Rationing by passing the impugned order on 5th July, 2021. The petitioner is aggrieved by the same.

According to the petitioner, there is a provision in the Control Order for grant of license on compassionate ground. As the petitioner is the unmarried sister and dependent family member of the deceased licensee, accordingly the license ought to be granted in her favour to save the family from starvation.

The petitioner relies upon the Control Order, 2013 which was published in the Kolkata Gazette Extraordinary on 8th August, 2013. Provision for engagement on compassionate ground as mentioned in the said Control Order reads as follows:

In case of vacancy arising out of death of an existing dealer, such vacancy shall not initially be notified. Prayer of any of the family members of the deceased having no regular means of subsistence will be considered with preference on compassionate ground provided, such prayer along with formal application in form 'C' along with Annexure-I with requisite fee is submitted within sixty days from the occurrence of such vacancy.

'Family members' as per the Clause 2(m) of the Control Order 2013 means spouse, dependent parents, dependent sons and daughters for the purpose of considering engagement as dealers/distributors on compassionate ground.

As the petitioner happens to be the unmarried sister of the deceased licensee her prayer for being engaged on compassionate ground has been rejected.

The petitioner has also relied upon the amendment made in the Control Order, 2003 which was published in the Kolkata Gazette Extraordinary on 28th March, 2005 wherein it was mentioned that in case of vacancy arising out of death of any existing dealer such vacancy shall not initially be notified. The prayer of the legal heirs will be considered with preference on compassionate ground. If out of several legal heirs only one legal heir is the claimant, he has to submit no objection of other legal heirs along with his prayer. On the basis of the aforesaid amendment

the petitioner had, at one point of time, submitted no objection if the license was granted to her brother.

The petitioner relies upon a Memo dated 28th February, 2006 issued by the Director General (F) and Ex-Officio Principal Secretary to the Government of West Bengal, Food and Supplies Department wherein it has been mentioned that, as directed by order of the Governor, in the event of death of an MR Dealer, the resultant vacancy need not be notified initially and the vacancy may be filled up by appointing the husband/wife/son/daughter/any other legal heir of the deceased, if he or she is otherwise found eligible in all respects and on obtaining the 'No Objection' from the other legal heirs. In case no suitable candidate in the above category is available, then necessary steps shall be taken for declaration of vacancy for filling up the post.

According to the petitioner, deleting the provision for engagement of 'any other legal heir' of the deceased in the Control Order, 2013 is ultra vires.

It has been contended that as per the Hindu Succession Act, 1956 dependents of a male Hindu have been specifically mentioned. As the deceased licensee was a bachelor at the time of death he did not have any first class heir. The petitioner being his sister falls within the second class heir category and accordingly her case ought to be considered in accordance with the Central Statute. It has been contended that the Hindu Succession Act being a Central Act will prevail over the Control Order published by the State Government.

The primary contention of the petitioner is that as the scheme for compassionate engagement provides for considering the case of the family members of the deceased having no regular means of subsistence, accordingly, the right of the petitioner to be considered for engagement on compassionate ground cannot be taken away by the restriction imposed in Clause 2(m) of the Control Order, 2013.

It has been submitted that the scheme for compassionate appointment is a beneficial legislation which has been enacted only for providing financial aid to the family of the deceased. The Fair Price Shop being the only source of income of the family and the same being run from the year 1951 the authority ought to consider the case of the petitioner for engagement. It has been submitted that the manner in which the term 'family members' has been described in Clause 2(m) of the Control Order, 2013 the same excludes the heirs as mentioned in the Hindu Succession Act. The definition is an exclusive one which is bad and is liable to be set aside.

It has been contended that the license was initially granted in favour of the father of the petitioner. On his death it was granted in favour of her mother who opted in favour of the son only after taking the no objection from the other members of the family. Presently on the death of the brother the family is left without any source of income.

The petitioner relies upon the judgment delivered by the Full Bench of this Court in the matter of ***State of West Bengal & Ors. -vs- Purnima Das*** reported in ***2017(4) CHN (Cal) 362*** wherein the term 'daughter' has been held to include married daughters. It has been submitted that as the licensee was a bachelor at the time of death and his parents pre-deceased him, accordingly the licensee does not have either a spouse or dependent parents or dependent sons and daughters but has unmarried brothers and sisters who are his family members.

The petitioner relies on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Brij Mohan Lal -vs- Union of India & Ors.*** reported in ***(2012) 6 SCC 502*** (paragraph 100) on the point that if the policy framed by the Government is against any Statute or the Constitution or runs contrary to the philosophy behind the provisions or if the same is de hors the provisions of the Act or legislations the Court can interfere in the policy decision of the State.

The petitioner's contention is that as the expression family members have been described in the manner which is contrary to the Hindu Succession Act, accordingly the Court ought to interfere and declare the definition Clause 2(m) of the Control Order, 2013 as ultra vires.

The petitioner prays that as the Fair Price Shop is running continuously on and from 1951 and the family of the deceased is wholly dependent upon the earnings from the said shop, accordingly, the license may be granted in her favour by setting aside the impugned order of rejection.

On the contrary, learned advocate representing the State respondents opposes the prayer of the petitioner. It has been submitted that engagement on compassionate ground can be made only in accordance with a scheme. In the absence of a scheme, engagement on compassionate ground cannot be made. It has been submitted that the Control Order, 2013 clearly specifies the members of the family who are entitled to be considered for engagement on compassionate ground. The petitioner being the sister of the deceased does not fall within the definition clause of the term 'family members' and accordingly the benefit of extending compassionate engagement to her cannot be allowed. It has been highlighted that compassionate engagement cannot be sought as a matter of right. Providing compassionate engagement to the petitioner will amount to violation of the provisions of Articles 14 and 16 of the Constitution of India.

The respondents rely upon the decision delivered by the Hon'ble Supreme Court in the matter of ***National Institute of Technology & Ors. -vs- Niraj Kumar Singh*** reported in ***(2007) 2 SCC 481*** (paragraphs 17 and 18).

The judgment delivered by the Hon'ble Supreme Court in the matter of ***Joseph Shine -vs- Union of India*** reported in ***(2019) 3 SCC 39*** (paragraphs 25 and 27) has also been relied upon by the respondents.

The respondents also rely on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Bhawani Prasad Sonkar -vs- Union of India & Ors.*** reported in **(2011) 4 SCC 209** (paragraphs 18 and 20).

According to the respondents the definition of the term 'family members' cannot be extended to such an extent to include sister of a deceased licensee to be eligible for being engaged on compassionate ground. It has been submitted that the Control Order 2003 does not apply in the present case. There is no lack of legislative competence on the part of the respondents to frame the scheme for providing engagement on compassionate ground and accordingly the prayer of the petitioner for declaring the provision for engagement on compassionate ground as ultra vires is not maintainable.

It has been argued that if relatives or next of kin are made eligible for being engaged on compassionate ground, then it will be an unending process which itself will amount to violation of the provisions of Articles 14 and 16 of the Constitution.

The respondents pray for dismissal of the writ petition.

I have heard and considered the rival submissions made on behalf of both the parties.

It is an admitted fact that the ration shop is run by the family members of the petitioner since 1951. Initially it was her father, then her mother and lastly her brother who ran the business. On the death of her brother on account of Covid-19 the family has suddenly fallen into financial crisis. The petitioner is a spinster and her brother was a bachelor. There are other unmarried brothers and sisters in the family.

It is also an admitted fact that though there is provision/scheme for providing engagement on compassionate ground to the family member of the deceased, the expression 'family members' as described in the Control Order, 2013 excludes the

relation 'sister' due to which the prayer of the petitioner has been turned down by the respondents.

It is not the case of the respondents that the petitioner is not eligible for being considered for engagement on compassionate ground for any other reason, but the definition clause of the expression 'family members' stands in the way of the respondents to consider the prayer of the petitioner.

The submission of the respondents that there is no legislative incompetence on the part of the respondents to frame a scheme is not under dispute, but as per the decision of the Hon'ble Supreme Court in the matter of Brij Mohan Lal (supra) the Court may interfere in the policy decision of the State if the policy is found to be against any Statute or is de hors the provision of the Act or legislations.

In the case at hand, the deceased was a Hindu bachelor. The expression 'family members' in the Control Order, 2013 does not take into consideration the case of either Hindu bachelor/spinster. It is not uncommon or unusual that the licensee is unmarried. The parents may have pre-deceased the licensee. In that event the other members of the family, specially the brothers and sisters, who do not have any other source of income and are solely dependent upon the income from the family business, will be left out of the purview of consideration for engagement on compassionate ground.

It is also not the case of the respondents that there is no scheme at all for providing engagement on compassionate ground. The language mentioned in Clause 20(vi) of the Control Order, 2013 is wholly in favour of continuation of the license by the family members of the erstwhile licensee on account of vacancy caused due to death or incapacitation. It clearly mentions that in case of vacancy arising out of death, such vacancy shall not be initially notified. The idea is to allow other family

members to continue with the business. The restriction to continue has been brought in the definition clause of the term 'family members'.

On the death of the parents, it is common practice that, the brothers and sisters, especially if they are unmarried, stay together in the joint mess as a single family. If the family has a business most of the family members, if not all, are some way or the other involved in the said family business. The license may be in the name of one of the members, but that does not stand in the way of the other members to extend a helping hand in the business. The earnings from the business may be the only source of earning of the family and the entire family may depend on the same. There may be sharing of profit in between the family members.

Here, the source of income of the family was the ration shop. The parents of the licensee expired long ago. The unmarried brothers and sisters lived together as a family. The license came down from the father to the mother and then to the brother. All on a sudden the brother expires due to Covid-19. Should in that case the prayer of the petitioner being the unmarried sister, be turned down only because she does not qualify as any of the members set out in Clause 2(m) of the Control Order, 2013?

For the purpose of obtaining a license for running the Fair Price Shop there are several factors which are to be taken into consideration. As the shop was in a running condition, till the death of the licensee in 2020, it is expected that all other conditions for running the business has been complied with. Only because of the fact that the petitioner does not fall within any of the relations as mentioned in Clause 2(m), she is unable to continue with the business.

The thrust of the respondents' submission is that as there is no provision for engagement of 'sister' on compassionate ground her case cannot be considered.

According to the provision of the Hindu Succession Act, 1956 the property of a male Hindu dying intestate devolves firstly upon the heirs specified in Class I of the Schedule and if there is no heir in Class I, then upon the heirs specified in Class II of the Schedule. In the instant case, the deceased does not have a Class I heir but has a Class II heir in the form of a sister, the petitioner herein.

The policy decision of the respondents in restricting the expression 'family members' only in respect of married members without taking into consideration the case of unmarried members appears to be a faulty and unbalanced one.

When the intention of the legislature is to confine the business within the family itself, prior to filling up the vacancy by declaring the same to be filled up by open competition, then there is no reason as to why a member of the family who was wholly dependent upon the income from the business will not be given a chance.

The Court fails to find any intelligible differentia in restricting the 'members' eligible to be considered for engagement on compassionate ground only to the heirs of a married person but not in case of unmarried person.

Article 15(3) of the Constitution permits the State to make special provision for women and children. Article 19(1)(g) of the Constitution gives right to the citizens to carry on a business which is not prohibited in law.

It is settled law that compassionate appointment cannot be claimed as a matter of right. It is an exception carved out in the service law arena to give appointment to the family member of an employee who died in harness solely with the view to tide over the immediate financial crisis faced on the death of a bread winner. The case at hand is not a service matter. The petitioner is not praying for any service from the Government, she is only praying for a license to continue the business which was run by her predecessors in interest from 1951 onwards.

It is not a case that the claimant is a far/distant relative of the deceased. The petitioner happens to be the full blooded sister of the deceased. She is an immediate family member of the deceased. She is no less a family member than spouse/ dependent parents/ dependent sons/ dependent daughters who is eligible for engagement under compassionate ground. The crisis faced by her on the death of her brother is nothing less compared to any of the members included in the definition clause.

It is true that it is not always possible to visualise all the situations in which compassionate engagement may be claimed, but a cursory glance at the relations mentioned in the definition clause makes it evidently clear that the case of an unmarried licensee was not taken into consideration at all. Though the Court is not *ad idem* with the submission of the petitioner that all Class II heirs are to be considered for compassionate engagement, but the case of full blooded relationships are required to be taken into consideration if otherwise eligible.

The decisions relied upon by the State respondents in their support are all in respect of service matters where appointment has been sought on compassionate ground. In the case at hand, the petitioner does not seek appointment. The legislature while framing the Control Order has consciously used the term 'engagement' on compassionate ground and not 'appointment' on compassionate ground.

Appointment is necessarily made in respect of a particular post where the employer pays salary to the employee and on superannuation the employee becomes entitled to certain financial relief for example gratuity, provident fund/pension etc. During the service tenure, the employee is entitled to his service benefits for example salary, dearness allowance, leave encashment, house rent allowance, travelling allowance etc.

In the present context engagement on compassionate ground is something completely different. No employment is given by the State. The State is not required to bear financial liability of the person to be engaged by paying salary or retirement dues. Employer-employee relationship is never created. There is no fixed term or period of service. The government grants license in favour of eligible candidates for maintaining supplies and securing availability and distribution of essential commodities under the Public Distribution System. The licensee in turn is entitled to receive commission on account of the service offered in distributing the essential commodities. It is a type of service to the public in lieu of commission to be paid by the Government.

The District Administration may declare new vacancy for catering to the need of the consumers in a particular area with the approval of the Department. The said vacancy is filled up by open competition. In case of death, the vacancy is notified only if any of the family members are found not suitable for engagement on compassionate ground in accordance with law.

The intention of the legislature is very clear from the provision relating to engagement on compassionate ground. The vacancy which arises on account of death of any existing dealer is not required to be initially notified. The legislature intends that the family members of the deceased dealer having no regular means of subsistence will be considered with preference for grant of license to continue with the dealership. The very purpose of extending this facility is particularly for the reason that a set-up is already in place from where the ration items are supplied to the consumers. The consumers at the same time are not required to switch over from one dealer to the other on account of the death of the dealer.

A series of formalities are required to be complied with prior to declaring and filling up of a vacancy in a particular area. For grant of license in favour of a candidate for supplying essential commodities variety of factors are required to be

taken into consideration. Location of the godown and the Fair Price Shop are extremely vital for taking a decision in the matter. Convenience of the consumers is of prime importance. When a set-up is existing for decades there is no reason as to why the same set-up cannot be continued and utilised on the death of the dealer. The infrastructure is equally important as the candidate.

In this case, the Fair Price Shop was functioning since 1951. The Rationing Department as well as the consumers of the area have become accustomed to the functioning of the ration shop from the said place. When a completely dependent family member of the deceased is available and is willing to continue with the dealership the same ought not to be rejected on the ground that the relationship which the applicant has with the deceased does not fall within the enumerated relationships mentioned in Clause 2(m) of the Control Order, 2013.

Here, the position is such, that, in case of the sister had the brother of the deceased made the application, then also it would have met the same fate of rejection, as neither brother nor sister falls within the definition 'family members' under Clause 2(m) of the Control Order, 2013.

The submission of the State that giving opportunity to the persons who are not described as family members in the Control Order will be in violation of the provision of Article 14 is misconceived. As none have a vested right to claim benefit on compassionate ground, accordingly engaging a person who is entitled to the benefit in accordance with the Control Order will certainly not be in violation of the Constitutional right.

In the opinion of the Court the relationships as mentioned in Clause 2(m) are incomplete and the same needs to be relooked. The case of bachelors and spinsters are also required to be taken into consideration at the time of framing such policy by the State. The policy decision should be in public interest and taken objectively

to meet a certain purpose. The policy of keeping the dependent family members of the deceased in the form of brothers and sisters out of the purview of the definition of family members is an arbitrary one. Such constricted approach is definitely not in line with the objective of the scheme.

In view of the above, the impugned order of rejection is set aside. The respondent authorities are directed to revisit the definition of 'family members' as appearing in Clause 2(m) of the Control Order, 2013 to include the relations of the dependents of bachelors / spinsters, especially the siblings, to avail the benefit of the provision for engagement on compassionate ground.

The respondent nos. 2 and 3 are directed to take a decision with regard to the prayer of the petitioner for being engaged on compassionate ground, in the light of the observations made herein above, within a period of eight weeks from the date of communication of a copy of this order. The said respondents shall pass a reasoned order and communicate the same to the petitioner immediately thereafter.

The interim arrangement that is continuing at present shall continue till a fortnight after the reasoned order is communicated to the petitioner.

The writ petition stands disposed of.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)