

06.09.2022
Court No.12
S/L. No. 45
Sourav/
Suvayan

**FMA 720 of 2018
With
IA No: CAN 1 of 2021**

**Sudhendu Kumar Hazra
Vs.
The State Bank of India & Ors.**

*Mr. Amal Baran Chatterjee, Sr. Adv.
Mr. Nirbanesh Chatterjee*

...for the appellant.

*Mr. Susovan Sengupta
Mr. Subir Pal*

...for the State.

1. Heard Mr. Amal Baran Chatterjee, learned Senior Counsel appearing for the appellant and Mr. Susovan Sengupta, learned Counsel appearing for the State.

2. The order dated January 10, 2017 passed by the Hon'ble Single Judge in WP No. 28993 (W) of 2013 is impugned in this appeal.

3. Brief facts giving rise to this appeal is as follows:-

A licence of M.R. Dealer at Village – Paraspur within Jalangi Anchal of Jalangi Police Station, Murshidabad was granted in favour of the petitioner's father in the year 1972. The father of the petitioner continued to run the Fair Price Shop till his death. On his death, the vacancy for the aforesaid Fair Price

Shop was notified. In view of consensual arrangement between the family members of the deceased M.R. Dealer, the licence for M.R. Dealer was issued in favour of the present appellant (the writ petitioner) as he was the eldest son of deceased M.R. Dealer. The present appellant who was continuing as a M.R. Dealer got appointment as a Primary School Teacher on August 24, 1995. Since July 12, 1987 he was continuing as the M.R. Dealer after death of his father.

4. Said fact of appointment of the present appellant as a teacher while he was continuing as a M.R. Dealer having not been intimated to the appropriate authority, enquiry was held and his licence was terminated. Against such order, the present appellant preferred a writ petition before this Hon'ble Court alleging that his dealership was illegally terminated and at least in his place his brother (present respondent no. 1) should have been appointed as M. R. Dealer. The writ petition was disposed of by the Hon'ble Court thus:

“Accordingly, I grant liberty to the writ petitioner to apply before the concerned authority naming one of his brothers with consent of all other family members for granting licence of dealership. Such application is to be made with a period of three weeks from the date. In case any such

application is made, such application should be considered by the concerned respondents and a licence be issued within a period of six weeks thereafter.”

5. The matter was carried in appeal by the State. The Division Bench, however, modified the order of the Hon’ble Single Judge to the extent that the application of the petitioner’s brother shall be considered in accordance with law and the order of the Hon’ble Single Judge to the extent that licence be issued to the brother of the petitioner within a period of six weeks was set aside.

6. Pursuant to the order passed by the Hon’ble Division Bench, the matter was taken up afresh by the Director of District Distribution Settlement and Supply and vide order dated August 9, 2010, he disposed of the appeal confirming the order of termination of M. R. dealership of the present appellant. Said order was challenged before the Hon’ble Single Judge in the aforesaid writ petition. The Hon’ble Single Judge relying on the Notification No. 5880-FS dated March 28, 2005 and Notification No. 7044-FS dated November 18, 2004 confirmed the order of the Director and dismissed the writ petition.

7. The order passed by the Hon’ble Single Judge is impugned before us on the following grounds:

i) The observation by the Hon'ble Single Judge to the effect that a new vacancy has occurred on account of resignation of the present appellant, the Ex-M.R. Dealer is erroneous, inasmuch as, the present appellant had not resigned but his licence was terminated.

ii) The present appellant was appointed as a M. R. Dealer in the year 1987 and he got appointment as a Primary School Teacher in the year 1995. As a dealer, he was getting only commission and not monthly salary and was not holding any post. In view of such fact though he was appointed as a Primary School Teacher, there being no bar in law, he could have continued as a Primary School Teacher as well as M. R. Dealer.

iii) Relying on the case of **Associated Timber Industries & Others Vs. Central Bank of India & Another** reported at **(2000) 7 Supreme Court Cases 93**, it is submitted that before labeling the concerned vacancy as a new vacancy, the Hon'ble Single Judge ought to have considered the context, not the text only. The context was that the dealership of the present appellant was terminated and he was thrown out from this position hence,

the vacancy is to be filled up by his brother as held by this Court in earlier writ petition and not through the procedure as described in Clause 19 of the Notification dated November 18, 2004.

8. It is submitted by the learned Senior Counsel appearing for the appellant that the present respondent no. 6, who is the brother of the present appellant should be re-appointed as a dealer in the resultant vacancy after termination of the dealership of the present appellant.

9. A distinction is made before us so far as a “new vacancy” and “repetitive vacancy” are concerned. We are not able to understand the meaning of “repetitive vacancy” as conveyed to us by the learned Senior Counsel appearing for the appellant. According to him, a new vacancy in accordance with the Notification dated November 18, 2004, shall occur on resignation or death of any dealer but not on termination of any dealer’s dealership. In the case of termination, the dealership should go by preference to the family members as held by this Court in the earlier writ petition. In case of later event, therefore present respondent no. 6, brother of the present appellant by consent of all the family members should have been appointed as a M.R. Dealer in the “repetitive vacancy”.

10. We are in 76th year of independence and this is the 73rd year of the adoption of the Constitution of India. There is nothing in the law or the appropriate control order framed by the State under Section 3 of the Essential Commodities Act or any delegation under Section 5 of the said Act to the effect that the M.R. Dealership is hereditary in any manner. It has, however, been recognized that compassionate appointment should be given in case of death or permanent incapacitation of a dealer. But in no event any provision has been made for devolution of the dealership on the next of kin of a dealer on his death or on his dealership being terminated. If provision would have been such, that provision must have been struck out of the statute book being hit by Article 14 of the Constitution of India and the principle of “Rule of Law”.

11. Vacancy is a vacancy and there cannot be classification of vacancy, only because resignation or death has been mentioned in Notification dated November 18, 2004, it cannot be narrowed down to show that in case of termination of dealership of a M. R. Dealer no new vacancy occurs. In all the events save and except compassionate appointment, all such vacancies should be thrown open for public

participation to satisfy the requirement of Article 14 to the Constitution of India.

12. According to the provisions of 2013 control order, in case of death or permanent incapacitation, however, no new vacancy occurs and same is not notified to give a chance for compassionate appointment as M.R. Dealer. But in any other event including termination of dealership of a M. R. Dealer, the vacancy so caused is a new vacancy and nothing less. Such vacancy is to be filled up in accordance with law and not otherwise. In no event, preference can be given to a near relative or brother of a dealer whose dealership has been terminated on narrow reading of Clause 19 of Notification dated November 18, 2004, which has no relevance now after coming into force of 2013 control order.

13. The Director while disposing the appeal filed by the present appellant, brother of present respondent no. 6 has specifically relied on Clause 5(2) of the West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules, 2001 which reads thus:

“No teacher shall engage himself in any trade or employment either part-time or whole time except the honorary work of social and charitable nature or of the co-operative

society. There shall be no bar in seeking election to the Panchayat bodies, Municipalities and legislature by a teacher.”

14. Viewed from the nature of business of a M. R. Dealer though he gets commission, it is a trade or employment as an agent of the Government. There may not be any bar in the appropriate control order but the aforesaid Clause 5(2) of the Rules, 2001 clearly bars a teacher from practicing any trade or employment on a part-time or whole time basis. The engagement as a M. R. Dealer cannot be brought under honorary work or social and charitable nature when the dealers are paid commission.

15. We also asked ourselves a question, can a teacher concentrate his mind in imparting education to the students if he is engaged otherwise than the profession of teaching, our conscience says “no”. A teacher cannot be allowed to function as a M. R. Dealer doing business at the notified time and attending school and imparting education to students of tender age. Such a combination even if not barred by law, assuming arguenda the submission of Mr. Chatterjee, learned Senior Counsel, it militate against common sense and against public policy.

16. So far as the judgment of Hon’ble Supreme Court in the case of ***Associated Timber Industries &***

Others (Supra) is concerned, we respectfully hold that the aforesaid decision specifically paragraph 35 of the decision does not apply to the facts of the present case.

17. In such view of the fact, we, accordingly, do not find any infirmity in the impugned order and dismiss the appeal.

18. Accordingly, the appeal being **FMA 720 of 2018** is dismissed.

19. There shall be, however, no order as to costs.

20. Urgent photostat certified copy of this order, if applied for, be given to the parties on completion of usual formalities

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)