

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

Present :- Hon'ble Justice Amrita Sinha

WPA No. 2774 of 2022

Gurupada Das

Vs.

State of West Bengal and 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. Susovan Sengupta, Adv. Mr. Subir Pal, Adv.
Hearing concluded on	:-	22.04.2022
Judgment on	:-	18.05.2022

Amrita Sinha, J.:-

The father of the petitioner was a fair price shop (FPS) dealer. During his lifetime he affirmed an affidavit on 2nd February, 2019 expressing his intention to transfer his dealership license in favour of the petitioner. A representation to the above effect was made by the father of the petitioner before the Sub-Divisional Controller on 5th February, 2019. Prior to any decision being taken in response to the application filed by the father of the petitioner, he died on 8th October, 2019.

After the death of his father, the petitioner applied before the Sub-Divisional Controller praying for grant of FPS dealership license in his favour in accordance with the desire expressed by his deceased father. An enquiry was conducted by the Chief Inspector (F & S) on 1st June, 2021 and a report was submitted by him on 3rd June, 2021. The petitioner was directed to attend a hearing on 25th June, 2021. The Sub-Divisional Controller by a communication dated 6th January, 2022

intimated the petitioner that his prayer for engagement on compassionate ground has been rejected by the government in terms of memo dated 8th November, 2021, of the Deputy Director (License) since one of his family members did not give the required 'no objection' in his favour.

The petitioner is aggrieved by the said rejection and challenges the same in the present writ petition.

It is the specific submission of the petitioner that during the lifetime of his father, application was made by his father before the respondent authority, expressing intention to opt for the petitioner for grant of license. The respondents intentionally and deliberately did not take any positive steps in response to the request made by the licensee.

As in accordance with the provisions of Clause 20 (vi) of the West Bengal Public Distribution System (Maintenance and Control) Order, 2013 [hereinafter referred to as the Control Order, 2013] there is no requirement of obtaining 'no objection' from the other eligible members of the family if the licensee opts in favour of any of the family members accordingly, the respondents ought to have issued the license in favour of the petitioner long back. Instead of issuing the license, the respondents maintained a stoic silence. In the meantime, the father of the petitioner, that is, the recorded licensee expired leaving behind other heirs apart from the petitioner herein.

The petitioner submits that the respondent authority ought to have proceeded immediately on receipt of the option that was filed by the licensee, and in accordance with the intention expressed by the licensee, ought to have transferred and issued the license in favour of the petitioner herein.

It has been strongly contended that had the authority taken steps in proper time, then the license could have been issued in favour of the petitioner during the

lifetime of the licensee and there would not have been any requirement for obtaining no objection from the other eligible family members.

The petitioner contends that the respondent authority, being the wrong doer, cannot take advantage of the inaction/non-action on its part and reject the claim of the petitioner.

In support of his stand for issuance of license in favour of the optee in accordance with the option exercised by the recorded licensee, the petitioner relies upon the judgment delivered by a co-ordinate bench of this Court on **19th February, 2014 in WP 34215 (W) of 2013 (Samar Das vs. The State of West Bengal and Ors.)**.

The petitioner also relies upon the judgment dated **18th December, 2020** passed by a co-ordinate bench of this Court in **WPA 18261 of 2017** in the matter of **Rajib Debnath vs. The State of West Bengal and Ors.**

In support of the contention that a wrong doer cannot take advantage of his own wrong, the petitioner relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of **Kusheshwar Prasad Singh vs. State of Bihar and Ors.** reported in **(2007) 11 SCC 447** paragraph 16.

According to the petitioner, the issue in the present case is no longer *res integra* and has been conclusively decided by this Court in the matter of Samar Das (supra). The law laid down in Samar Das was followed in the matter of Rajib Debnath (supra).

The petitioner contends that judicial decorum demands that the law laid down by the Court in a similar matter is to be followed by the subsequent Bench. In support of the said contention the petitioner relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of **Sandhya Educational Society**

and another vs. Union of India and Ors. reported in ***(2014) 7 SCC 701*** paragraph 9.

Prayer has been made for setting aside the impugned order of rejection with a further direction upon the respondent authority to issue the license in his favour.

Learned advocate representing the State respondents vociferously opposes the prayer of the petitioner. It has been contended that had the application of the licensee opting for the petitioner been accepted during his lifetime, then the issue would have been different. The moment the licensee expires; vacancy arises out of death of the licensee. In case of death, any of the family members of the deceased licensee can apply for license only after obtaining no objection from the other eligible family members.

In the present case vacancy arose on the death of the licensee, and as such, application for issuance of license on compassionate ground can be entertained only if any of the eligible family members apply with the requisite no objection from the other eligible family members.

It has been submitted that the language of the provision of the Control Order relating to engagement on compassionate ground is very clear and unambiguous. The Court ought not to interpret the same in a manner contrary to what has been laid down therein.

It has been argued that as the provision of the Control Order requires furnishing a no objection from the other eligible family members of the deceased licensee, accordingly, the petitioner is bound to submit the same for obtaining the license on compassionate ground.

It has been submitted that the law laid down by the Court in Samar Das (supra) and Rajib Debnath (supra) will not be applicable in the facts of the present

case and as such the same will not be binding upon this Bench at the time of deciding the issue.

It has also been submitted that there may be some delay on the part of the respondent authority in taking prompt steps in the matter, but the petitioner cannot take advantage of the alleged wrong on the part of the respondent authority and seek for issuance of license in his favour on compassionate grounds.

It has been argued that engagement on compassionate ground is always an exception to the general rule of appointment and the same is required to be made strictly in accordance with the scheme laid down by the Government. The provisions of the scheme have to be given a very strict interpretation.

The cause of action arises only when the licensee is declared to be incapacitated/ infirm but the same ends when the licensee expires. A fresh cause of action arises on the death of a licensee. To avail the benefit of being engaged on the ground of incapacitation of the ex licensee, the licensee ought to remain alive at the time when license is being issued in favour of the optee.

It has been enthusiastically argued that it is settled law that if a matter is required to be done in a particular manner, the same has to be done in that manner or not at all. The option exercised by a licensee remains in force only during the lifetime of the licensee, and its effect ceases immediately on the death of the licensee.

On this score the respondents rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Hossain Ghatiali alias MHGA Shaikh and Ors. Vs. The State of Gujrat*** reported in ***(2014) 8 SCC 425*** paragraph 21.3 and 25.

Learned advocate for the respondents relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Santi Lal Gupta and Ors. Vs.***

Modern Co-operative Housing Society Limited and Ors. reported in **(2010) 13 SCC 336** paragraphs 15, 17 and 18 on the score that it is not the duty of the Court to enlarge the scope of the legislation or to reiterate, recast or reframe the legislation.

The respondents further rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of **Siddharam Satlingappa Methre vs. The State of Maharashtra and Ors.** reported in **(2011) 1 SCC 694** paragraphs 128 to 138 on the issue of *per incurrium*. It has been submitted that the order passed in the matter of Samar Das (supra) and Rajib Debnath (supra) has been passed in ignorance of the terms of the Statute.

The respondents pray for dismissal of the writ petition.

I have heard the submissions made on behalf of both the parties and have perused the materials on record.

Clause 20 of the Control Order, 2013 lays down the provision for engagement of dealer.

According to Clause 20 (i)(b) of the Control Order 2013 in the event of death or incapacitation of the existing new dealer on medical ground, unless any of his/her family members is found suitable for engagement on compassionate ground as per sub-Clause (vi); the resultant vacancy has to be notified by the Sub-Divisional Controller, Food and Supplies with prior approval of the department.

The same implies that a vacancy arising out of death or incapacitation of the existing individual dealer on medical ground, may be filled up as provided, for engagement on compassionate ground only in accordance with sub-clause (vi) of Clause 20 of the Control Order, 2013.

Clause 20 (vi) lays down the provision for engagement on compassionate grounds. It mentions that at the time of making application for engagement on compassionate ground on account of incapacitation, the applicant is not required to furnish no objection from the other family members, if the ex-licensee, because of his/her being incapacitated/infirm has opted for the applicant.

In the present case though an application was made by the licensee opting in favour of the petitioner herein but the said application did not reach its logical conclusion. Prior to the said application being accepted and approved by the Sub-Divisional Controller, the licensee expired.

As per the aforesaid provision, the Sub-Divisional Controller is required to arrange for an enquiry to verify the eligibility of the applicant and submit a report with his opinion to the District Controller. While forwarding a case on medical grounds the Sub-Divisional Controller is required to satisfy himself on examination of the medical prescription and certificate issued by a registered Government Medical Practitioner that the ex-licensee was not in a position to run dealership business considering his/her medical ground.

The District Controller is thereafter required to forward the same with his comments to the State Government through the Director, DDP & S for necessary approval. After the Government approves, the Sub-Divisional Controller issues an offer letter to the approved candidate.

It is not that whenever an application is made by a licensee opting in favour of a family member, the same is accepted and approved. It may be that the option exercised by the licensee may not be approved by the authority.

A vacancy is a *sine qua non* prior to the same being filled up. Till the application made by the licensee for transferring the license on medical ground is approved by the competent authority; the vacancy does not arise. Only after the

application of the licensee is approved, does the vacancy arise to be filled up as per the option exercised by the licensee.

In the instant case, it does not appear that the application filed by the licensee opting in favour of the petitioner was at all taken up for consideration by the respondent authority. Till the same is proceeded with in accordance with the steps mentioned in the Control Order, 2013 the application remains inconclusive.

Here, unfortunately, the licensee expired prior to a final decision being taken in response to his application expressing his option in favour of the petitioner. Accordingly, it cannot be taken that the vacancy in the present case arose out of incapacitation or on medical ground(s) of the licensee. On the contrary, it appears that the vacancy arose only on the death of the licensee and not prior thereto. Nothing has been brought on record to show that the Sub-Divisional Controller recorded his satisfaction that the licensee was not in a position to run the business on medical ground.

The argument of the petitioner that the respondents were at fault in not taking prompt steps in considering the application of the licensee and accordingly they ought not to take advantage of their own wrong, will also not come to the aid of the petitioner. Prima facie, it appears that there has been a delay on the part of the respondent authority in prompt consideration of the application of the licensee which cannot be supported in law, but at the same time, the prayer of the petitioner for grant of license by jumping the steps as mentioned in Clause 20 (vi) of the Control Order, 2013 also cannot be accepted.

At this stage, the next contention of the petitioner that the application of the licensee made during his lifetime ought to be treated as valid till the same is disposed of by the respondent authority, also cannot be accepted by the Court.

As long as the licensee is alive, his right to the license remains intact till the license is transferred in favour of the person opted for by him. As soon as the licensee expires, the right of the eligible family members to seek engagement on compassionate ground accrues. Proceeding with the declaration of the deceased licensee to transfer the license in favour of the erstwhile optee will amount to infringement of the right of the other claimants which arises only on the death of the licensee.

License is not a property which can pass on to another as per the will, choice and desire of a deceased licensee. The expression and the term used in the Control Order, 2013 is that no objection from the other family members will not be required if the 'ex-licensee' opted for the applicant. Legislation consciously used the term 'ex-licensee' and not 'deceased licensee'. The expressions 'ex-licensee' and 'deceased licensee' are not the same and they cannot be used interchangeably.

It is clear that the term 'ex-licensee' has been used only to imply that the licensee remains alive till the process of transferring the license concludes. It is then that the vacancy arises out of incapacitation. On death of the licensee prior to conclusion of the transfer of license, the vacancy cannot be treated as vacancy on medical ground, and the same has to be treated as vacancy arising on death of the licensee.

The Court in the matter of Samar Das (supra) was considering the question as to whether the option exercised by an ex licensee during the existence of 2003 Control Order loses its force with the intervention of the 2013 Control Order. In Rajib Debnath (supra) consideration before the Court was whether the petitioner's fresh application under Control Order, 2013 can be considered as a continuation of the former representation initially submitted under the Control Order, 2003.

In Rajib Debnath (supra) the application for transfer of the recorded licensee was duly processed and approved by the government.

It is settled law that the ratio of a decision depends upon the facts and circumstances of a given case. A slight difference in facts may lead to a different conclusion. Here the recorded licensee made an application on medical ground in accordance with the Control Order 2013 opting in favour of the petitioner. The application for transfer was not processed at all. Prior to the application being disposed of in accordance with Clause 20 (vi), the applicant expired leaving behind more than one eligible heir. It is not the case that application was made under the earlier Control Order 2003 and the same has to be treated as continuation even after promulgation of the Control Order, 2013. Accordingly, the ratio laid down in Samar Das (supra), Rajib Debnath (supra) and Sandhya Educational Society (supra) will not be applicable here.

In such a situation, will the no objection from the other eligible heirs be required for issuance of license for engagement on compassionate ground?

According to the provisions of the Control Order, 2013 license is not heritable but the eligible family member of the deceased licensee do get a priority in issuance of fresh license on compassionate ground. The same however can be transferred only during the lifetime of the licensee if the licensee opts in favour of one of the eligible family members.

In the present case, the recorded licensee opted to transfer the license in favour of the petitioner. Had the license been transferred during his lifetime then the right of the other heirs to claim engagement on compassionate ground would not have arisen at all. The moment the licensee dies prior to the transfer being effected, the other legal heirs also become eligible to be considered for engagement on compassionate ground. The right of the family members to be considered for

engagement on compassionate ground accrues only on the death of the licensee. It is in such a situation that no objection is required from the other eligible family members in favour of one of the eligible members. In the absence of a no objection from the other eligible members, the issue of grant of license for engagement on compassionate ground become contentious. If there is a rival claimant for obtaining the license on compassionate ground, and in the absence of a consensus, the authority is required to declare vacancy in the said locality in accordance with the Control Order, 2013.

The declaration of the licensee opting in favour of one of the eligible family members has to be given effect during the lifetime of the licensee. The same cannot be treated as a will of the deceased licensee for giving effect to after his death.

If the recorded licensee dies prior to transfer of license in favour of the chosen candidate, the declaration loses its force and steps have to be taken for filing up the vacancy in accordance with the Control Order, 2013.

The submission of the petitioner that the respondents cannot take advantage of their own wrong is a very settled proposition of law. However, in the instant case the petitioner cannot take the benefit of the delay on the part of the respondent authority to proceed and conclude the process of transferring the license in favour of the chosen candidate, because the rights of the other eligible candidates for being considered for engagement on compassionate ground will be infringed the moment the petitioner's case is taken up for consideration relying on the declaration of the deceased licensee. One wrong cannot be supported by another and two wrongs do not make a right.

Giving any other interpretation to the above proposition will amount to rewriting or enlarging the scope of the legislation which is impermissible and contrary to the principle laid down in *Santi Lal Gupta (supra)*.

As it has been observed hereinabove that the facts of the case of Samar Das (supra) and Rajib Debnath (supra) are dissimilar to the facts of the present case, accordingly, the ratio laid down in Siddharam Satlingappa Methre (supra) will not be applicable here.

It is always open for the aggrieved person to initiate appropriate proceeding and sue the person(s) responsible for the delay on account of which the petitioner has suffered a wrong, but the same will not give any right to the aggrieved party to compel the authority to act de hors the provisions of law.

The impugned order accordingly does not require any interference.

The writ petition fails and is hereby dismissed.

No costs.

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

(Amrita Sinha, J.)