

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

**The Hon'ble Justice Subrata Talukdar
and
The Hon'ble Justice Krishna Rao**

FMA 119 of 2022

with

IA No. CAN 1 of 2021

Sri Durga Enterprise & Anr.

Versus

The State of West Bengal & Ors.

For the Appellants	: Mr. Kalyan Bandyopadhyay Mr. Ram Anand Agarwala Ms. Nibedita Pal Mr. Ramesh Dhara Mr. Ananda Gopal Mukherjee, Mr. Sonam RoyAdvocates
For the State	: Mr. Susobhan Sengupta Mr. Subir PalAdvocates
For the Respondent No. 4	: Mr. Sagar Bandyopadhyay Mr. Soma Kar GhoshAdvocates
Heard on	: 17.03.2022
Judgment on	: 13.04.2022

Krishna Rao, J.:-

1. This appeal is directed against the judgment passed by the Hon'ble Single Judge in WPA No. 8470 of 2021 dt. 19th August, 2021 wherein the writ petition of the appellant was dismissed.
2. The appellant had filed writ application praying for a Mandamus upon the respondents to tag all the dealers of Bhagwanpur-II Block with the petitioner's distributorship.
3. In the year 2005, the respondents have published vacancy notice for appointment of distributor and accordingly, the appellant no. 1 being the Partnership firm applied for the vacancy at Bhupatinagar within one kilometre from Block office of Bhagwanpur-II.
4. The appellant no. 1 was found eligible and the respondents have appointed the appellant as distributor for the location Bhupatinagar within one kilometer from Bhagwanpur-II Block Office for distribution of food grains and other commodities under Public Distribution System on 15.09.2009 and since then time to time the respondents have renewed the licence of the appellants.
5. The appellants are aggrieved with the number of ration cards which have been tagged with the private respondents. According to the appellants only 20 dealers having 1,54,1697 ration cards have been tagged with the appellants whereas the private respondent no. 4, Alka Mondal has 37 dealers with 2,81,460 ration cards and additional seven dealers with 46,901 ration cards and the respondent no. 5, M/s

Ramkrishna Enterprise, has 41 tagged dealers with 2,96,504 ration cards with two additional dealers with 14,862 ration cards.

6. The contention of the appellants that at least 2.5 lakh ration cards would have been tagged with the appellant but surprisingly only 1,54,197 ration cards have been tagged whereas more than the 2.5 lakh cards have been tagged with the private respondents.

7. During the pendency of the writ petition, the Ld. Single Judge had directed the respondent no. 2 to file report in the form of affidavit by disclosing the reasons why the appellants were unequally treated in contrast to the two other distributors. In compliance of the order of the Ld. Single Judge, the respondent no. 2 had submitted report in the form of Affidavit.

8. The licence was granted to the petitioner in the year 2009 in respect of Bhupatinagar under Purba Medinipur District and since then the appellants are continuing with the said business and the appellants have at no point of time raised any objection for tagging of more ration cards or raised any grievance for want of more ration cards.

9. National Food Security Act, 2013 was promulgated with effect from 5th July, 2013 and as per the Act it is the duty of the State Government to identify the eligible beneficiaries under the Act for the purpose of Targeted Public Distribution System and accordingly, eligible beneficiaries have been selected. The eligible beneficiaries are required to be tagged with the respective Fair Price Shops from where they can get their entitled quantity of food grains.

10. Tagging of the ration cards to the private respondents was done on the basis of the norms laid down under the National Food Security Act, 2013 by considering the geographical location, convenience of the beneficiaries and the distance travelled by the beneficiaries.
11. After promulgation of the National Food Security Act, 2013, the respondents have issued a Memorandum on 12th March, 2015 by cancelling the Memo dt.13.04.1999 and Memo dt. 04.02.2004.
12. The husband of the respondent no. 4 was initially appointed as distributor at Bajkul under Bhagwanpur-I Block and M.R. Distributorship of the husband of the respondent no. 4 was for entire undivided Bhagwanpur Block and total 102 dealers were tagged with the said distributorship. In the year 2005, after the appointment of respondent no. 5 as Distributor, all dealers of Khejuri-I and Khejuri-II being 41 in numbers were de-tagged from the respondent no. 4 and tagged with respondent no. 5.
13. The appellants were appointed as Distributor at Bhupatinagar within Bhagwanpur-II Block in the year 2009 and after the appointment of the appellant no. 1, upon assessing the distance between the places of the business of the dealers and the place of business of the appellant no. 1, 20 dealers out of 29 dealers of Bhagwanpur-II Block were detagged from the distributorship of the husband of the respondent no. 4 and tagged with the distributorship of the appellant no.1 and the same was duly accepted by the appellants without any objection and the appellants started carrying their business.

14. At the same time two other dealers of Bhagwanpur-II Block were also de-tagged with the respondent no. 5 and the remaining 7 dealers being the nearest to the distributorship of the husband of the respondent no. 4 remained tagged with his distributorship.

15. After the death of the husband of the respondent no. 4 during Covid-19, the wife of the respondent no. 4 had applied for the said distributorship on compassionate ground and accordingly on complying with the provisions of the Control Order 2013, the wife of the respondent no. 4 was granted distributorship in place of her husband.

16. After the approval, the distributorship was made in favour of the respondent no. 4 in respect of Bhagwanpur-I Block Kaptyabari under Egra Sub-Division, Purba Medinipur. The ration cards of the 44 dealers which were previously tagged with the distributorship of the husband of the respondent no. 4 was re-allotted to the respondent no. 4 vide order dt. 04.03.2021. It appears that out of 44 dealers who were previously tagged with the distributorship of the husband of the respondent no. 4, 37 dealers belong to Bhagwanpur-I Block under Egra Sub-Division and 7 dealers belong to Bhagwanpur-II Block under Contai Sub-Division which were restored in favour of respondent no. 4. The respondents have tagged 7 dealers of Bhagwanpur-II Block with the respondent no. 4 by taking into consideration the convenience and benefit of the eligible beneficiaries and the remoteness and accessibility to the fair price shop. The distance required to be travelled by the dealers tagged with the respondent no. 4 is much less which is appearing in the table below as mentioned in Paragraph 5 (IX) of Affidavit in opposition of the Respondent No.4.

Sr.	Name of the Dealers	Distance from Respondent no. 4	Distance from Writ Petitioner
1.	Swapam Kumar Pradhan	10.0 K.M.	20.K.M.
2.	Asit Kumar Mondal	3.9 K.M.	16 K.M.
3.	Pradip Kumar Mondal	3.9 K.M.	16 K.M.
4.	Basanta Kumar Dhara	2.1 K.M.	20 K.M.
5.	Dipak Sasmal	8.7 K.M.	10 K.M.
6.	Dilip Kumar Jana	13.1 K.M.	10 K.M.
7.	Subal Chandra Prodhan	6.4 K.M.	21 K.M.

17. The Learned Counsel for the appellant relied upon the order passed by the Hon'ble Single Judge on 06.04.2021, when the appellants have moved the writ application before the Hon'ble Single Judge and in the said order, the Hon'ble Single Judge has observed that "in respect of submission of the respondent no. 1, I find that the right of the petitioners is to be treated equally by the authority". For this reason, they can very well come to the Writ Court for protection of their right to equal treatment. Learned Counsel for appellant submitted that the said observation reached its finality as the respondents have not challenged the said order. Relying upon the said observation of the Hon'ble Single Judge, the Ld. Counsel for the appellant relied upon the judgment reported in IILJ 1998 (Supreme Court) 89. The Ld. Counsel for the appellant relied upon paragraph 13 of the said judgment which reads as follows:-

“13. Though the said explanation may not strictu sensu apply to the trial stage, the principle couched in it must gain application thereto. It is immaterial that the writ petition was filed only subsequently because the findings made therein became final as no appeal was filed against the judgment. The basic idea in the rule of res judicata has sprouted from the maxim “remo debet bis vexari pro una at eadem causa” (no man should be vexed twice over for the same cause). In Y.S. Patil & Ors. v. Y.L. Patil 1976 (4) SCC 66 a three-Judge Bench of this Court considered the effect of a decision rendered in a writ petition at subsequent stages of the same lis. It held: “The principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding.”

18. The Ld. Counsel for the appellant further relied upon the judgment reported in (2009) 3 SCC 250 paragraph 28 which reads as follows:-

“28. We also do not understand as to how the Division Bench could be impressed by the fact that the interim order was not appealed against by the State Government. It is to be understood that an interim order does not decide the fate of the parties to the litigation finally, it is always subject to and merges with the final order passed in the proceedings. The non-filing of the appeal, which seems to have impressed the Division Bench, according to us, is of no consequence.”

19. This Court considered the order passed by the Hon’ble Single Judge when the writ application was moved on 06.04.2021 and the judgments relied upon by Learned Counsel for the appellant. It reveals that the Hon’ble Single Judge has passed an order dt. 06.04.2021 on the very first day, when the writ petition was moved and at that point of time actual fact was not brought before the Ld. Single Judge on behalf of the respondents and when the respondents have filed their report justifying the allocation of the dealers to the appellant and the private

respondents, it proves that the status of the parties is not equal. In view of the same, the judgment relied upon by the appellant is not applicable in the instant case.

20. The Counsel for the appellant relied upon the judgment reported in (2020) SCC Online SC 101 at paragraphs 14 to 17 which reads as follows:-

“14. Finally, the prolonged delay of many years ought not to have been overlooked or condoned. Services of the Respondent were terminated within months of his appointment, in 1978. Statedly, the Respondent made a representation and served UPPCL with a legal notice in 1982, however such feeble effort does little to fill the gap between when the cause of action arose and he chose to seek its redressal (in 1990).

15. Seen from a different perspective also, it is clear that the Respondent has shown little concern to the settled legal tenets. Even a civil suit challenging termination of services, if filed by the Respondent, would have undoubtedly been barred by limitation in 1990. In a similar situation where the appellant belatedly challenged the promotion of his junior(s), this Court in [P.S. Sadasivaswamy v. State of Tamil Nadu](#)¹, held as follows:

“2. ... if the appellant was aggrieved by it he should have approached the Court even in the year 1957, after the two representations made by him had failed to produce any result. One cannot sleep over the matter and come to the Court questioning that relaxation in the year 1971. ... In effect he wants to unscramble a scrambled egg. It is very difficult for the Government to consider whether any relaxation of the rules should have been made in favour of the appellant in the year 1957. The conditions that were prevalent in 1957, cannot be reproduced now. ...It is not that there is any period of limitation for the Courts to exercise their powers under [Article 226](#) nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under [Article](#)

226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.....”

16. Whilst it is true that limitation does not strictly apply to proceedings under Articles 32 or 226 of the Constitution of India, nevertheless, such rights cannot be enforced after an unreasonable lapse of time. Consideration of unexplained delays and inordinate laches would always be relevant in writ actions, and writ courts naturally ought to be reluctant in exercising their discretionary jurisdiction to protect those who have slept 1 (1975) 1 SCC 152. over wrongs and allowed illegalities to fester. Fencesitters cannot be allowed to barge into courts and cry for their rights at their convenience, and vigilant citizens ought not to be treated alike with mere opportunists. On multiple occasions, it has been restated that there are implicit limitations of time within which writ remedies can be enforced. In *SS Balu v. State of Kerala*², this Court observed thus:

“17. It is also well-settled principle of law that “delay defeats equity”. ...It is now a trite law that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment.”

(emphasis supplied)

17. Similarly, in *Vijay Kumar Kaul v. Union of India*³ this Court while considering the claim of candidates who, despite being higher in merit, exercised their right to parity much after those who were though lower in merit but were diligently agitating their rights, this Court observed that:

“27. ...It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time.”

21. The Counsel for the appellant further relied upon the judgment reported in (1964) 6 SCR 261 at paragraph 17 which reads as follows:-

“17. At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any Rule for universal application. It may however be stated as a general Rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a Civil Court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution.”

22. The Ld. Single Judge had dismissed the writ application not only on the ground of delay and latches. The Ld. Single Judge while deciding the issues has held as follows:-

“The equal treatment right which the petitioners are seeing is grossly misconceived in the facts and circumstances of the instant case. Firstly, the petitioners have approached this Court directly without highlighting their grievance before the concerned authorities, that too, at a delayed date without any plausible excuse. Secondly, the petitioners have failed to produce any evidence to show that there has been any arbitrariness or mala fide on the part of the respondent authorities by tagging more number of cards with the private respondents than that has been tagged with them.

The license of the petitioner No. 1 was issued only in respect of Bhupatinagar area and not in respect of the entire Bhagwanpur-II Block. It was/is open for the District Administration to assess the relevant factors including the convenience of the eligible beneficiaries and the proper functioning of the Public Distribution System at the time of taking the decision for tagging the cards. Location of the Fair Price Shop, distance of the godown, accessibility etc. are pertinent issues which plays a vital role in the decision making process.”

23. The Ld. Single Judge has decided the writ petition on merit and thus the Judgment relied by the Counsel for the appellant reported in (2020) SCC online 101, (1964) 6 SCR 261 (supra) are not applicable in the instant case.

24. The Ld. Counsel for the appellant relied upon the judgment reported in (1999) 5 SCC 612 at paragraph 4 which reads as follows:-

“4. Under the provisions of the Andhra Pradesh Scheduled Commodities (Regulation of Distribution by Card System) Order, 1973, which order has been framed under the provisions of the [Essential Commodities Act, 1955](#) a Fair Price Shop Dealer has no right to be appointed as such dealer. The licence which such dealer has obtained under the

provisions of the Act to deal with the commodities has not been cancelled. The right to trade under [Article 19\(1\)\(g\)](#) of the Constitution of India is not being affected in any manner. The Government as a policy decision, decided to reduce the number of cards per dealer. Such decision does not affect the rights, if any, of the Fair Price Shop Dealers and as such the High Court was in error to hold that they were to be given any notice prior to the impugned decision of the State Government.”

25. In this case, the specific case of the respondents is that the private respondents were appointed as Distributor in the year 2005 and tagged with their respective ration cards of the respective area and subsequently in the year 2009, the appellant was appointed as a Distributor and was allotted 20 dealers after de-tagging from the shop of the husband of the respondent no. 4 which was duly accepted by the appellant. The State respondents have never de-tagged any ration card from the shop of the appellant and tagged the same with the private respondents. The dealers are tagged with the private respondents since the time of distributorship granted to the private respondents and thus the judgment reported in (1999) 5 SCC 614 is not applicable in the instant case.
26. After considering the rival submissions of the parties, documents available with the record and the judgment referred to by Learned Counsel for the appellant, this Court is of the view that the licence of the appellant was issued only in respect of Bhupatinagar and not in respect of the entire Bhagwanpur-II Block and, it is open to the respondent authorities to assess the relevant factors, including the convenience of the eligible beneficiaries and proper functioning of the Public Distribution

System at the time of taking decision for tagging the cards. As per the provisions of the National Food Security Act, 2013, the location of the Fair Price Shop, the distance of the godown and accessibility are the pertinent issue which plays a vital role in the decision making process.

27. In view of the above, this Court is of the view that the order passed by the Hon'ble Single Judge does not require any interference as there is no fundamental or any statutory right of the appellants have been infringed.

28. **FMA No. 119 of 2022** with **IA No. CAN 1 of 2021** are thus **dismissed.**

Parties shall be entitled to act on the basis of a server copy of the Judgment 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.

(Subrata Talukdar, J.)

(Krishna Rao, J.)