

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 12047 OF 2015

National Consumers Cooperative Stores Ltd.

Vs.

State of West Bengal & Ors..

For the Petitioner : Mr. Arkadipta Sengupta,
Mr. Subhajit Dasadvocates

For the State : Mr. Sirsanya Bandopadhyay,
Ld. Junior
Standing Counsel,

Mr. A.K. Nagadvocate

Heard on : 29.04.2022

Judgment on : 19.05.2022

Hiranmay Bhattacharyya, J.:-

1. This writ petition is at the instance of a co-operative society praying for a writ in the nature of mandamus to set aside the Memo dated May 12, 2015 issued by the respondent no. 5 and for setting aside the Memo dated April 8, 2015 issued by the Deputy Secretary, State of West Bengal and for prohibiting the respondents not to fill up the vacancy declared vide vacancy notice dated 12.05.2015.

2. The facts leading to the filing of the instant writ petition is as follows:-

A notification dated March 23, 2007 was issued by the District Controller, Food and Supplies, Murshidabad declaring the vacancy for new M.R. Distributorship at Chowki-Mouza under Bewa-II Gram Panchayat in the District of Murshidabad and applications were invited from the intending parties. Petitioner as well as other intending candidates submitted their applications for obtaining M.R. Distributorship. The Sub-Divisional Controller issued a Memo dated September 29, 2008 informing the petitioner to remain present on October 16, 2008 for holding enquiry of the godown. Petitioner claims to be present on October 16, 2008 and the inspection team made enquiry with regard to the fulfilment of criteria mentioned in the advertisement. A writ petition being WP No. 18223 (W) of 2009 was filed by one Rabindranath Das claiming to be a partner of the partnership firm namely "Baba Baidyanath Bhandar" which was disposed of by an order dated July 29, 2010 by directing the respondent no. 2 to consider the representation dated September 9, 2009 and to take a decision thereon in accordance with law within a stipulated time frame. The respondent no. 2, by an order dated November 12, 2010, rejected the claim of M/s. Baba Baidyanath Bhandar upon holding that the partnership firm does not qualify for the proposed distributorship. Another applicant of the said notification dated March 23, 2007

namely Hossain Mohammad Kaizar filed a writ petition being WP 2394 (W) of 2011 challenging the order dated November 12, 2010 passed by the respondent no. 2. The said writ petition being WP 2394(W) of 2011 stood dismissed by an order dated April 7, 2011. The petitioner claims to have acquired knowledge from the order dated November 12, 2010 that the District Controller has recommended the name of the petitioner for filling up the vacancy in question as the most suitable candidate.

3. The petitioner claims to have submitted several representations, the last of which was dated December 10, 2011 requesting the concerned authority to dispose of the matter. The petitioner thereafter filed a writ petition being WP No. 16066 of 2012 alleging inaction on the part of the respondent authorities in granting licence of M.R. Distributorship. The said writ petition was disposed of by an order dated January 8, 2015 by directing the competent authority to issue the license of M.R. Distributorship under reference in favour of the petitioner provided the petitioner is otherwise eligible for granting the above license and subject to compliance of all formalities in accordance with law.
4. Pursuant to the said order a notice of hearing dated March 25, 2015 was issued directing the petitioner to attend the hearing before the respondent no. 2 on March 27, 2015. The petitioner alleges that subsequently a vacancy notice dated May 12, 2015 was issued and applications were invited from

different class of entities for filling up the vacancies of M.R. Distributorship at NTPC More, Farakka in the District of Murshidabad. Being aggrieved, by the said action of the respondent authorities the instant writ petition has been filed.

5. The specific stand of the respondents in their affidavit-in-opposition is that the vacancy declared by Memo dated March 23, 2007 was under West Bengal Public Distribution System (Maintenance & Control) Order 2003 (for short “2003 Control Order”) which stood repealed as on 08.08.2013 with the enforcement of the West Bengal Public Distribution System (Maintenance & Control) Order 2013 (for short “2013 Control Order”). Thus, according to the State respondents the vacancy declared prior to August 08, 2013 under 2003 Control Order stands cancelled and a new/ fresh vacancy under the 2013 Control Order was declared in terms of paragraph 26(ii) of the said Control Order. The further, stand of the state respondents is that the application of the petitioner pursuant to the vacancy notice being Memo dated March 23, 2007 was at the stage of consideration and therefore, no legal right accrued in favour of the petitioner to claim appointment against vacancy declared under the 2003 Control Order. In the said affidavit the State respondents disclosed the order dated April 8, 2015 cancelling the vacancy notice being Memo dated March 23, 2007 notified as per the 2003 Control Order with a direction to the District Controller to declare a

fresh vacancy as per provisions of 26(ii) of 2013 Control Order.

6. Mr. Abhratosh Majumder learned Senior Counsel for the petitioner contended that since the petitioner was found to be the most suitable candidate for the M.R. Distributorship in respect of the site in question the respondent authorities ought to have appointed the petitioner as an M.R. Distributor for the site in question. He, further, contended that the right of the petitioner to be appointed as a M.R. Distributor was recognised by the orders passed by this Hon'ble Court and the action of the State respondents in cancelling the vacancy declared under the 2003 Control Order amounts to misuse of power by the statutory authority. He contended that the respondent authorities misused their statutory power by converting an existing vacancy into a new and fresh vacancy in the garb of power under Clause 26(ii) of the 2013 Control Order. In support of his contention that the court shall restrain misuse of statutory power exercised by an authority, he relied upon the decision of the Hon'ble Supreme Court in the case of *Smt. Shrisht Dhawan vs. M/S. Shaw Brothers* reported at (1992) 1 SCC 534 and in the case of *Express Newspapers Pvt. Ltd. & Ors vs. Union Of India & Ors.* reported at (1986) 1 SCC 133. He further submitted that if a statute requires an authority to exercise power upon being satisfied that the conditions for exercise of that power exists, such satisfaction is to be based on the grounds mentioned in the

statute. He further, submitted that in case a person aggrieved alleges that the satisfaction was based on irrelevant grounds, this court can scrutinise the same in exercise of the powers of judicial review. In support of such contention, Mr. Majumder, placed reliance on a decision of the Hon'ble Supreme Court of India in the case of *Indian Nut Products and Ors. vs. Union Of India and Ors.* reported at (1994) 4 SCC 269.

7. Per contra, Mr. Bandopadhyay, learned junior standing counsel representing the state respondents contended that para 42 of the 2013 Control Order repealed the 2003 Control Order and only the investigation, penalty, imposition of punishment for any offence committed by the licensee against the 2003 Control Order was saved. By taking aid of the said provision in the 2013 Control Order, Mr. Bandopadhyay, contended that upon repeal of the 2003 Control Order the vacancies declared under the said Control Order also stood extinguished as there is no provision in the 2013 Control Order for retaining those vacancies. In support of such contention he relied upon a decision of a co-ordinate bench of this court in the case of *Tapan Sen vs. The State of West Bengal and ors.* reported at 2015 SCC Online (Cal) 6872. He further contended that since the application of the writ petitioner for appointment as a M.R. Distributor was pending consideration before the concerned authority, no legal right accrued in favour of the writ petitioner for being appointed as a M.R. Distributor in

respect of the site in question. He contended that the 2013 Control Order was promulgated for maintaining supplies and securing availability and distribution of essential commodities under the public distribution system. He further contended that since a new policy has been framed by the state for filling up the vacancies for giving preference to self help groups specially women self help groups, the object behind promulgation of this 2013 Control Order will be frustrated in the event the 2013 Control Order is not followed for filling up the vacancy in question. He contended that the vacancy was declared by the respondent authority in exercise of powers under para 26(ii) of the 2013 Control Order. He also contended that the case of the writ petitioner is akin to the claim of wait listed candidates for being appointed to post. He contended that the recommendation of the name of the petitioner does not give him any right to get appointment and in support of such contention he placed reliance on the decisions of the Hon'ble Supreme Court in the case of (2013) 12 SCC 171 in the case of *Manoj Manu and Another vs. Union of India and ors.* reported at (2013) 12 SCC 171 and in the case of *Raj Rishi Mehra and ors. Vs. State of Punjab and Another* reported at (2013) 12 SCC 243. He further submitted that the petitioner cannot claim that vested right accrued in his favour merely on the basis of recommendations of the concerned authority and in support of such contention he placed reliance on a decision of the Hon'ble Supreme Court in the case of *Sethi Auto Service Station and Another vs. Delhi Development Authority*

and Ors. reported at (2009) 1 SCC 180. He further contended that the state has the power to frame its policy and even to change the earlier policy. He contended that in case the government decides to proceed with the matter of filling up the vacancy in terms of the new policy the petitioner cannot claim any vested right to compel the authority to continue with the selection process as per the old policy which stood repealed in the meantime. In support of his contention as to the effect of change of policy on a recruitment process, Mr. Bandopadhyay placed reliance on a decision of the Hon'ble Supreme Court in the case of *State of Madhya Pradesh and Others vs. Raghuveer Singh Yadav and Ors.* reported at (1994) 6 SCC 151.

8. In reply Mr. Majumder contended that the para 42 of the 2013 Control Order has no manner of application in the instant case and the respondents cannot be permitted to act contrary to the stand taken by them in course of hearing of WP No. 16066 (W) of 2012. He further contended that the petitioner is a registered co-operative society and is also eligible for being appointed as a M.R. Distributor even under the 2013 Control Order. He contended that the preferential treatment to self help groups and women self help groups can be given in case of new vacancies and the same cannot be applied to vacancies which existed prior to the commencement of the 2013 Control Order.

9. The District Controller after considering the merits and demerits of the candidates on the basis of the enquiry report of the Sub-Divisional Controller recommended the petitioner as the most suitable candidate for filling up the said vacancy. The said fact was duly recorded in the order dated November 12, 2010 passed by the respondent no. 2. The said order of the respondent no. 2 was not interfered with by this Hon'ble Court in WP 2394(W) of 2011 which stood dismissed by an order dated April 7, 2011.
10. Thereafter, the petitioner submitted a representation requesting the respondent authority to dispose of the said matter. However, even thereafter the respondent authorities sat tight over the matter which prompted the writ petitioner to approach this court in the year 2012 by filing a writ petition being WP No. 16066(W) of 2022 alleging inaction on the part of the respondent authorities in granting license of M.R. Distributorship on the basis of the process of selection issued by notification dated March 23, 2007.
11. In course of hearing of the said writ petition, the learned additional government pleader, on specific instruction, submitted that the matter is pending before the respondent no. 2 for taking further steps in the matter. After taking note of the said submission and the materials on record, a co-ordinate bench, by an order dated January 8, 2015 directed the competent authority to issue the license of M.R. Distributorship under reference in favour of the petitioner within a specified time limit provided the

petitioner is otherwise eligible for granting the above license. It would be relevant to quote a portion of the said order dated 08.01.2015 as the same would be necessary for the purpose of deciding the instant writ petition which runs thus-

“According to the petitioner, there is no bar and/or impediment to issue the license of M.R. Distributorship in favour of the petitioner.

It is submitted by Mr. Ansar Mondal, learned additional Government pleader, High Court, Calcutta, on instruction, that the matter is pending before the respondent no. 2 for taking further steps in the matter.

In view of the above, I direct the competent authority to issue the license of M.R. Distributorship under reference in favour of the petitioner within a period of six weeks from the date of communication of this order provided the petitioner is otherwise eligible for granting the above licence and subject to compliance of all formalities in accordance with law.”

12. It is not in dispute that till the filing of the writ petition being WP NO. 16066(W) of 2012, the 2003 Control Order was in force. Unfortunately, for the writ petitioner, the writ petition was disposed of only on January 8, 2015 and during the pendency of the writ petition, the 2013 Control Order was promulgated. Though, the writ petitioner approached this court for grant of M.R. Distributorship license on the basis of the process of selection issued by the notification dated March 23, 2007 when the 2003 Control Order was in force but the same was kept pending before this Hon’ble Court and

was disposed of at a point of time when the 2013 Control Order came into operation.

13. It appears from the hearing notice dated March 25, 2015 issued pursuant to the order dated January 8, 2015 in WP No. 16066(W) of 2012 that the hearing was fixed on March 27, 2015 and the petitioner claims to have attended the said hearing on the scheduled date but alleges that the decision of the said meeting was not communicated to the writ petitioner.
14. It appears from the record that the vacancy vide Memo dated March 23, 2007 was cancelled by an order dated April 8, 2015. Thus, it is evident from the action of the respondent authority that they treated the vacancy as per the 2003 Control Order to be subsisting till the issuance of the order dated April 8, 2015. It further appears from the order dated April 8, 2015 that the District Controller was directed to declare a fresh vacancy as per provision of 26(ii) of the Control Order 2013. This action on the part of the respondent authority in cancelling the vacancy declared as per the 2003 Control Order is nothing but a classic example of misuse of statutory power by the respondent authority by trying to nullify the order passed by this court.
15. No reasons have been assigned by the respondent authorities as to why the issue regarding grant of license in M.R. Distributorship in respect of the vacancy declared vide Memo Dated March 23, 2007 was kept pending even after the passing of the order dated April 7, 2011 in WP 2394(W) of

2011. Furthermore, when WP No. 16066(W) of 2012 was taken up for hearing on January 8, 2015 the specific stand of the learned additional government pleader, on instruction, was that the matter is pending before the respondent no. 2 for taking further steps in the matter. Though the petitioner approached this court for grant of M.R. Distributorship license on the basis of the process of selection initiated vide notification dated March 23, 2007 when the 2003 Control Order was in operation the petitioner cannot be blamed for the long pendency of the matter and could not also be made to suffer the consequences of the long pendency of the writ petition before this court.

16. It is well settled that an act of court cannot prejudice any party. The respondent authorities cannot take shelter behind promulgation of a new Control Order during the pendency of the writ petition filed by the writ petitioner herein in the year 2012 as the authorities are solely responsible for the inordinate delay in taking the final decision. Furthermore, even at the time of hearing of the writ petition on January 8, 2015 the respondent authority did not make any submission that the prayer of the petitioner for issuance of M.R. Distributorship license on the basis of the notification dated March 23, 2007 cannot be processed any further in view of promulgation of the 2013 Control Order. On the other hand, the instruction given by the respondent authority to the State advocate, as it appears from the recording in the order dated January 8, 2015, is that the matter is pending before the

respondent no. 2 for taking further steps in the matter. Thus, taking further steps in the matter would obviously mean taking further steps to conclude the process which is pending. In view of such submission of the learned counsel representing the state, the co-ordinate bench directed the competent authority to issue license of M.R. Distributorship in favour of the petitioner provided the petitioner is otherwise eligible for grant of such license. Thus, the only aspect which was left for the authorities to consider was whether the petitioner was eligible and also complied with all formalities in accordance with law. Though, the respondent authorities conducted a hearing on March 27, 2015, no decision was communicated. Thus, this court is of the considered view that a vested legal right has accrued in favour of the petitioner by virtue of the order dated January 8, 2015 passed in WP No. 16066(W) of 2012 to have his application considered in accordance with the provisions of the 2003 Control Order. The observation contained in the order dated 08.01.2015 that the license is to be granted subject to compliance of all formalities in accordance with law shall mean, in the facts of the instant case, compliance of all formalities in accordance with the provisions of the 2003 Control Order.

17. A similar issue came up for consideration before a co-ordinate bench in *Tapan Sen* (supra) wherein several writ petitions were decided. While deciding a writ petition, on an identical issue, it was held that a vested legal right has

accrued in favour of the writ petitioner by virtue of an earlier judgment passed by the court and authorities were directed to re-examine the case of the writ petitioner in accordance with the provisions of the 2003 Control Order after quashing the order rejecting the petitioner's claim.

18. Furthermore, when the matter was heard by the respondent no. 2 on March 27, 2015 in terms of the direction passed by the order dated January 8, 2015 in WP No. 16066(W) of 2012, the vacancy declared vide Memo dated 23.03.2007 was subsisting as the same was cancelled by the order of the Deputy Secretary, Government of West Bengal, Food and Supplies Department on April 8, 2015 i.e., after the hearing took place before the authority. In view of such steps being taken, the respondent cannot be permitted to take a different stand that the earlier vacancy stood automatically extinguished, as argued by Mr. Bandopadhyay. The respondent authorities instead of communicating their decision in terms of the order passed by Court on the earlier writ petition cancelled the vacancy thereby nullifying the order of this Court. Thus, this court is of the considered view that the action of the statutory authority in cancelling the Memo dated 23.03.2007 after the matter was heard by the authority amounts to misuse of power by the statutory authority or gross abuse of power. In *Express Newspaper (P) Ltd.* (supra), the Hon'ble Supreme Court on the issue of fraud on power held thus-

“119. Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in S. Pratap Singh v. State of Punjab. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an 'alien' purpose other than the one for which the power is conferred in mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in General Assembly of Free Church of Scotland v. Overtown, “that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred”. It was said that Warrington, C.J., in Short v. Poole Corporation, that :

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

In Lazarus Estates Ltd. v. Beasley, Lord Denning, L.J. said :

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

See also, in L Lazarus case at p.722 per Lord Parker, CJ:

'Fraud' vitiates all transactions known to the law of however high a degree of solemnity.

All these three English decisions have been cited with approval by this Court in Partap Singh case."

19. In *Shrisht Dhawan* (supra), the Hon'ble Supreme Court held that abuse of power or *mala fide* exercise of power also amounts to fraud.
20. Therefore, by applying the ratio of the judgment in *Indian Express Newspaper (P) Ltd.*(supra), and *Shrisht Dhawan* (supra) this Court holds that the said order dated April 8, 2015 is liable to be set aside as it is vitiated by fraud. Accordingly, the Memo dated 12.05.2015 which was issued pursuant to the order dated April 8, 2015 is also liable to be set aside and quashed.
21. The appellants in *Sethi Auto Service Station* (supra) contended that they had a legitimate right to allotment/relocation of petrol pump at alternative sites on the basis of the recommendations made by the technical committee. However, on the basis of complaints regarding resitement enquiries were made and the issue of relocation was taken up and a detailed note was made recording the steps taken including the discussions of the screening committee and from the recording in the note sheet it appeared that the proposals for resitement were not finally approved. In view of such facts, it was held that mere favourable recommendations at some level of the decision

making process does not bind the authorities. In the case on hand no adverse report is forth coming on the recommendation made in favour of the petitioner.

22. The writ petitioner's case is not based on legitimate expectation but that a vested legal right accrued in favour of the petitioner for the reasons as stated hereinbefore. In view thereof the decision in the case of *Sethi Auto Service* (supra) is not applicable to the case on hand.

23. The decision of the Hon'ble Supreme Court in the case of *Raj Rishi Mehra* (supra) is not applicable to the facts of the instant case as the Hon'ble Supreme Court while dealing with the issue as to whether the candidates whose names are included in the wait list are entitled to be appointed as against the unfilled posts as a matter of right the Hon'ble Supreme Court held such issue in the negative. The said decision is not applicable to the case on hand as a legally vested right accrued in favour of the petitioner as held hereinbefore.

24. The Hon'ble Supreme Court in the case of *Manoj Manu* (supra) observed that if the government decides not to fill up the required/ advertised vacancies on some valid reason the court would not issue any mandamus to the government to fill up the vacancies even at the instance of a person whose name is included in the select list as such person did not acquire any right to be appointed. In the case on hand, it is not the case that the government has decided not to fill up vacancies. On the other hand it is evident from the materials

on record that the government was taking steps to fill up the said vacancy and have also issued orders and notifications in respect thereof. Therefore, the said reported decision in *Manoj Manu* (supra) is also not applicable to the facts of the instant case.

25. In *Raghuveer Singh* (supra) the Hon'ble Supreme Court while holding that the candidates who appeared and passed the written examination has only legitimate expectation to be considered according to the rules which were in vogue and no right accrued in their favour merely by passing the written examination. The case on hand is not based on legitimate expectation but that a vested right had accrued in favour of the petitioner to be considered in terms of the earlier policy.

26. The decision of the Hon'ble Supreme Court in *Indian Nut Product* (supra) is not of any assistance to the petitioner as this Court has already observed that the Memo dated 12.05.2015 is liable to be set aside for reasons indicated hereinbefore and this Court is not required at this stage to enter into the issue as to whether the required steps were taken prior to issuance of the said Memo.

27. For the reasons as aforesaid the order dated April 8, 2015 passed by the Deputy Secretary and the notice being Memo dated 12.05.2015 issued by the District Controller, Food and Supplies, Murshidabad stands set aside and quashed. Consequently, the vacancy notification dated 23.03.2007 stands revived. The Director being the respondent no. 2 is directed to issue license of M.R. Distributorship in respect of

Chowki-Mouza under Bewa-II Gram Panchayat, NTPC More in the District of Murshidabad in favour of the petitioner provided the petitioner is otherwise eligible for such licence and has complied with all the formalities in accordance with the provisions of the 2003 Control Order in the light of the observations made hereinabove. In case the respondent no. 2 is not entitled to the licence in accordance with law, the reason therefor are to be communicated to the petitioner after giving an opportunity of hearing to the petitioner or his authorised representatives. The entire exercise shall be completed within a period of four weeks from the date of communication of this order.

28. The writ petition accordingly stands disposed of with the above directions. There shall be, however, no order as to costs.

29. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.

(Hiranmay Bhattacharyya, J.)

Later:

Date: 19.05.2022

After this judgment is delivered, Mr. Bandopadhyay, learned Junior Standing Counsel for the State prays for stay of operation of the judgment.

The prayer for stay is considered and rejected.

(Hiranmay Bhattacharyya, J.)

(P.A.- Sanchita)