

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 17930 of 2021

M/s. Bipatarini Agency and Anr.

Vs.

The State of West Bengal & Ors.

For the petitioners : Mr. Surajit Nath Mitra, Adv.
Mr. Timir Baran Saha, Adv.
Mr. Sudip Sarkar, Adv.

For the respondent no. 8 : Mr. Kalyan Bandyopadhyay, Sr. Adv.
Mr. Ram Anand Agarwal, Adv.
Ms. Nibedita Pal, Adv.
Mr. Ramesh Dhara, Adv.
Mr. Ananda Gopal Mukherjee, Adv.
Ms. Sonam Roy, Adv.

For the State : Mr. S.N. Mukherjee, Advocate General
Mr. Sirsanya Bandopadhyay, Adv.
Mr. Arka Kumar Nag, Adv.

Last Heard on : 11.08.2022.

Delivered on : 06.09.2022.

Moushumi Bhattacharya, J.

1. The dispute in the present writ petition relates to the creation of a M.R. Distributorship in Purba Bardhaman district of West Bengal where the petitioner no.1 and the respondent no. 8 are the rival applicants. The petitioners seek a mandamus on the State respondents to cancel the license issued to the respondent no. 8 for such Distributorship. By the impugned documents dated 9.11.2021 and 11.11.2021, the respondent no. 8 (Sonai Food Marketing) was authorised to act as Distributor under the West Bengal Public Distribution System (Maintenance & Control) Order, 2013 and the Director, Department of Food & Supplies was asked to accord online approval in favour of the respondent no. 8.

2. A brief outline of the proceedings filed by the petitioner no. 1 and the respondent no. 8 in relation to allocation of the M.R Distributorship is necessary before alluding to the contentions of the parties.

3. A vacancy Notification for the appointment of M.R. Distributor at Surekalna in the district of Purba Bardhaman was published on 23.7.2018. This was superseded by another Notification dated 9.1.2019. Both the publications were issued by the office of the District Controller, Food & Supplies, Purba Bardhaman. The concerned State respondents received nine applications including from the petitioner no. 1 and the respondent no. 8. However, the vacancy Notification was cancelled on 7.8.2019 by an order of the Department of Food and Supplies. This

cancellation was challenged by the respondent no. 8 in WPO 360 of 2020 which was allowed by a learned Single Judge by a judgment dated 18.12.2020. The Court set aside the order dated 7.8.2019 by which the second vacancy Notification was cancelled and directed the respondent authorities to process the application of the respondent no. 8 for engagement as M.R. Distributor in accordance with law. The learned Judge relied on a Division Bench judgment of 9.10.2020 in FMA 913 of 2020 (*Kultali Food Marketing Pvt. Ltd. vs. State of West Bengal*) in coming to the conclusion that the order of 7.8.2019 pertaining to cancellation of engagement of M.R. Distributor was not proper.

4. The concerned respondents considered the application received for M.R. Distributorship pursuant the judgment dated 18.12.2020, but found the applications of the petitioner no. 1 and the respondent no. 8 to be ineligible. Aggrieved by the decision, the petitioners filed a writ petition being WPA No. 5843 of 2021 praying for appointment of the petitioner. The said writ petition was taken up for hearing by a learned Judge and by an order dated 3.3.2021, the Court gave directions for affidavits and clarified that in the event the State respondents engaged any distributor with reference to the subject matter of the writ petition, the said act will not create any equity in favour of the engaged distributor.

5. The respondent no. 8 filed WPA No. 4928 of 2021 challenging the rejection of its application. The said writ petition was finally dismissed

by a judgment and order dated 30.4.2021. The aforesaid judgment was challenged by the respondent no. 8 and the appeal was allowed by the Division Bench by its judgment dated 26.8.2021 whereby the order of the Single Bench was set aside and the State respondents were directed to process the application of the respondent no. 8 for M.R. Distributorship in accordance with law. The State respondents considered the application of the respondent no. 8 in terms of the order of the Division Bench (according to the State respondents) and issued the M.R. Distributorship to the respondent no. 8 on 9.9.2021.

6. The issue of license to the respondent no. 8 is the subject matter of challenge in the present writ petition.

7. The basis of the petitioners' grievance is two-fold. First, the selection of the respondent no. 8 as M.R. Distributor for the particular block in Purba Bardhaman and second, the rejection of the petitioners' application for the said distributorship. Learned Counsel appearing for the petitioners submits that the State authorities had failed to respond to the application made by the petitioner for the distributorship which constrained the petitioners to file WPA 5843 of 2021. Counsel submits that the said writ petition is pending as on date and that the respondent no. 8 is not a party in the said writ petition. Counsel submits that the State authorities did not disclose any reason in the said writ petition as to why the petitioners were found to be ineligible. It is further submitted that the State respondents acted in inordinate haste for granting the

M.R. Distributorship to the respondent no. 8 citing the order of the Division Bench but without considering the application of the petitioners. Counsel objects to the selection of the respondent no. 8 on the ground that the respondent no. 8 does not fulfil any of the eligibility criteria for being allocated the distributorship. Counsel submits that the license was issued to the respondent no. 8 on extraneous considerations and in violation of the stated criteria for selection of M.R. Distributor.

8. The learned Advocate General appearing for the State defends the selection of the respondent no. 8 on the ground that the respondent no. 8 fulfils the criteria of the relevant Notification. Counsel submits that the State respondents acted in terms of the order of the Division Bench dated 26.8.2021 by which the respondents were directed to consider the application of the respondent no. 8 and that upon such fresh consideration, the State was satisfied of the existence of all the eligibility criteria of the respondent no. 8. Counsel submits that the writ petitioners have not complied with the requisite eligibility criteria for being appointed as M.R. Distributor and that the allegations made against the State are misconceived and without basis.

9. Learned counsel appearing for the respondent no. 8 submits that the present writ petition is not maintainable since the petitioners did not challenge its rejection despite having full knowledge of the same. Counsel further submits that the petitioners were given liberty by a learned Judge by an order dated 3.3.2021 in WPA 5843 of 2022 filed by

the petitioners to file an appropriate application for interim relief if the occasion so arises. It is further submitted that having failed to challenge the rejection, the petitioners cannot claim to come within the zone of consideration and do not have any enforceable right to challenge the impugned decision. Counsel relies on the order of the Division Bench dated 26.8.2021 by which the State was directed to proceed with the application of the respondent no. 8. Counsel urges that the decision in favour of the respondent no. 8 is fully justified with reference to the Notification dated 3.1.2019 for award of the M.R. Distributorship.

10. The adjudication in the present matter involves a combination of facts in respect of the rejection of the petitioners and award of the M.R. Distributorship to the respondent no. 8 to the exclusion of the petitioners. The evidence before the Court throws up the following five undisputed facts:

- The application of the petitioner no. 1 was not cancelled by the State respondents by way of a formal rejection.
- The State did not enumerate the grounds for cancelling the petitioners' application.
- The respondent no. 8 was awarded the distributorship on 9.11.2021 despite an earlier rejection on 28.1. 2021.
- The reasons for the change in the stand of the State from the rejection of 28.1.2021 to the award of distributorship to the respondent no. 8 on 9.11.2021 are not explained.

- There is no clarification as to whether the respondent no. 8 fulfills the criteria mentioned in the relevant Notification.

The above points are briefly dealt with below.

11. The petitioner had first applied for distributorship in August, 2018 which was rejected by the State in January, 2021. The affidavit-in-opposition filed by the State to the earlier writ petition being WPA 5843 of 2021 does not disclose any documents communicating cancellation of the petitioners' application save and except an allegation that the petitioner's godown was not in conformity with the norms of the Central Warehousing Corporation (CWC). No other details were disclosed by the State for such rejection at any point of time. The petitioners case in WPA No. 5843 of 2021 was considered by the learned Judge resulting in the order dated 3.3.2021 by which the Court clarified that no equity would be created in favour of any distributor who may be engaged by the State in the meantime. The reasons for the rejection of the petitioners application remain unclear till date.

12. The respondent no. 8 was found to be eligible for the reasons stated in a document dated 28.1.2021. The letter from the District Controller, Food & Supplies, Purba Bardhaman specifies that applications were invited only from self-help groups and entities mentioned in the Notification dated 3.1.2019 whereas the respondent no. 8 is a Company. The letter also specifies that the proposed godown of the respondent no. 8 failed to conform to the CWC norms due to

absence of top ventilation and limited ancillary facility as required for eligibility. The impugned award of distributorship to the respondent no. 8 on 9.11.2021 however does not refer to the earlier rejection or more significantly, whether the respondent no. 8 rectified the factors mentioned in the intervening ten months. The impugned communication of 9.11.2021 simply lists the conditions which would have to be fulfilled by the respondent no. 8 for award of the distributorship. The absence of reasons in the impugned award of distributorship becomes more glaring when seen against the factual backdrop of the absence of reasons for rejecting the petitioners' application in 2021.

13. The evidence produced by the parties before the Court on the eligibility criteria contained in the Notification dated 3.1.2019 raises a doubt on the eligibility of the respondent no. 8 for being awarded the Distributorship. The land on which the godown of the respondent is situated is agricultural land. The record of titles of the said land as well as the title deed of the respondent no. 8 shows that the land is a 'Sali' / agricultural land. The fact that the godown of the respondent no. 8 is not a 'pucca' structure and is without a sanctioned plan is also part of records and corroborated in photographs placed before the court. This has also not been disputed by the respondent no. 8.

14. Further, the fact that the godown of the respondent no. 8 not conforming to the CWC norms would appear from the earlier rejection

order of the respondent no. 8's application on 28.1.2021. This particular finding of the State was not interfered with in the writ petition filed by the respondent no. 8 being WPA 4928 of 2021 which was dismissed by the Court on 30.4.2021. The Division Bench in its order dated 26.8.2021 did not go into the merits of the rejection. The respondent no. 8 has not produced any documents to controvert any of the factors in relation to the agricultural land or the godown not being a 'pucca' structure or not having a sanctioned plan. The State authorities have also not explained the discounting of the factors for which the respondent no. 8 had been rejected in January, 2018. There is no evidence that the criteria has been satisfied by the respondent no. 8 between January, 2021 and November, 2021.

15. The last two bullet points mentioned above lead to the presumption of a lack of transparency in awarding the Distributorship in favour of the respondent no. 8. Although the State as well as the respondent no. 8 have relied on the order of the Division Bench dated 26.8.2021, the said order merely set the order of the learned Single Judge aside and directed the State to process the application of the respondent no. 8 in accordance with law. The order cannot be construed to be read as a peremptory direction on the State to award the M.R Distributorship in favour of the respondent no. 8. Reference in this context may be made to *A.P. SRTC vs. G. Srinivas Reddy; (2006) 3 SCC 674* for the proposition that a direction for considering a representation would mean that the respondents must consider every aspect of the

matter. It may also be relevant to state that the documents produced by the State of 21.8.2018 to show that the nature of the land in question was changed from 'Sali' to 'Gudam' (non-agricultural land) was not disclosed earlier by the State despite having sufficient opportunity to do so.

16. The other issue aggravating the lack of transparency is the decision granting license to the respondent no. 8 being taken on 9.11.2021 and the District Controller, Food & Supplies, Purba Bardhaman seeking online approval for creation of a new M.R Distributorship in the name of the respondent no. 8 within two days thereafter namely 11.11.2021. In *Bahadursinh Lakhubhai Gohil vs. Jagdishbhai M. Kamalia; (2004) 2 SCC 65*, the Supreme Court relied upon *S.P. Kapoor (Dr) vs. State of H.P.; (1981) 4 SCC716* to hold that a thing done in post-haste would lead to a presumption of malafides.

17. For completeness, the objections taken by the respondent no. 8 to the present writ petition should also be dealt with. The point that the petitioners could have applied in WPA 5843 of 2021 for relief before the learned Judge pursuant to the liberty given by the Court on 3.3.2021 may be answered thus. Since the respondent no. 8 was not a party to the said writ petition, the petitioners could not claim any relief against the respondent no. 8 in the said proceeding. More important, the petitioners have approached the Court by way of the present writ petition against the award of Distributorship to the respondent no. 8

which, in effect, translates to a fresh cause of action. The second issue raised is that the petitioner, being an unsuccessful applicant and not having challenged the same, cannot file the present writ petition. This Court finds substance in the stand taken by the petitioners that the petitioners were never communicated with any formal order of cancellation. Hence the petitioners challenging the same did not arise at the material point of time. The letter dated 27.1.2021 from the Joint Secretary, Govt. of West Bengal to the Director, Food and Supplies Department, Govt. of West Bengal does not refer to the reasons for rejecting the application of the petitioners. The letter is in any event an internal document and was not communicated to the petitioners.

18. The Warehouse Manual for Operationalizing of Warehousing (Development & Regulation) Act, 2007 relied upon by the respondent no. 8 in support of the fact of the respondent no. 8 conforming to the relevant CWC requirements does not assist the respondent no. 8. Clause 11.5 of the Manual refers to certain specifications for roofing and the materials to be used read with clause 9 for specifications for walls do not match with the photographs of the respondent no. 8's godown.

19. The question is not so much whether the petitioners qualify for the Distributorship but whether the State authorities have conformed to all the conditions of eligibility under its own Notification dated 3.1.2019 for issuing the license for M.R Distributorship in favour of the respondent no. 8. The relevant facts seen together cast a very real

shadow over the impugned transaction between the State and the respondent no. 8. The shadow becomes even more hazy by the fact that the petitioners were not furnished the reason for the rejection of their application. Moreover, contrary to the submissions made on behalf of the State and the respondent no. 8, no orders of Court have been placed to show that the State was directed to award the Distributorship to the respondent no. 8. The haste with which the license was issued to the respondent no. 8, though a relatively minor factor, combines with the overall picture of the petitioners being excluded from the race for reasons which are not apparent from the records before the Court. Transparency and accountability is the rule for all transactions but becomes sacrosanct where the State or a government agency is a party in the decision-making process. There is no room for discretion in cases where the selection is to be made on specific criteria. Any departure from the criteria framed would lead to a presumption of favouritism for oblique motives.

20. The order of the Division Bench relied upon in MAT 269 of 2022 dated 1.3.2022 were on different facts and cannot be of any assistance to the respondents. In any event, the appellants in that case were given liberty to challenge the order of rejection in accordance with law.

21. In view of the above reasons, this Court finds substance in the grievance of the writ petitioners. WPA 17930 of 2021 is accordingly allowed in terms of prayer (a). The license awarded to the respondent

no. 8 by way of the communications dated 9.11.2021 and 11.11.2021 is cancelled. The State respondents are directed to consider the applications of the petitioners, respondent no. 8 and any other eligible applicant afresh in terms of the relevant Notification and come to a decision within a period of 10 weeks from the date of communication of this judgment.

Later

Learned advocate-on-record appearing for the private respondent prays for stay of operation of the judgment. Considering the reasons given in the above judgment, such prayer is considered and refused.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)