

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar

MAT 71 of 2023
M/s. Mahabir Traders, Tantigeria, Rangamati
Vs.
Arunava Sasmal & Ors.
With

FMA 110 of 2015
Ramesh Kumar Sharma
Vs.
State of West Bengal & Ors.

For the Appellants in MAT 71 of 2023 & For the private respondents in FMA 110 of 2015	:	Mr. Saptangshu Basu, Sr. Adv. Mr. Debabrata Saha Roy, Adv., Mr. Pingal Bhattacharyya, Adv., Mr. Neil Basu, Adv.
For the Respondent no. 1 in MAT 71 of 2023	:	Mr. S.N. Mitra, Sr. Adv., Mr. Timir Baran Saha, Adv.
For the Appellant in FMA 110 of 2015	:	Mr. Timir Baran Saha, Adv.
For the State in both the appeals	:	Mr. Susovan Sen, Adv., Mr. Subir Pal, Adv.
Hearing concluded on	:	8 th September, 2023
Judgment on	:	10 th October, 2023

1. **Soumen Sen, J.:-** Both the appeals involved common question of law and facts are taken up together by consent of the parties and disposed of by this common order.

2. For the sake of brevity, the appellant, M/s. Mahavir Traders, is described as “partnership firm” and Ramesh Kumar Sharma, the appellant in FMA 110 of 2015 is described as “Ramesh”.

3. The genesis of the dispute with regard to the grant of distributorship under West Bengal Distribution System (Maintenance & Control), 2003 (hereinafter referred to as the “Control Order 2003”) by which a fresh licence was issued in favour of the partnership firm reconstituted on 23rd August, 2010.

4. The appellant partnership firm would contend that it was only a renewal of the existing distributorship licence whereas Arunava Sasmal, the writ petitioner in WPA 2946(w) of 2016, would contend that it is a fresh licence.

5. The partnership was originally constituted on 2nd November, 1965 and two supplementary agreements were executed thereafter, the last of which was in September 1979. It appears that prior to 25th October, 2004 the partnership was having only two partners, Sri Omprokash Saksaria and Sri Jagadish Prosad Sharma. The said partnership firm was carrying on business of grocery of wholesale and M.R Distributor in partnership in the district of Paschim Medinipur in the name and style of M/s Mahavir Traders.

6. On 25th October 2004, the partnership firm was re-constituted with three partners, namely, i) Sri Omprokash Saksaria, ii) Sri Jagadish Prosad Sharma and iii) Smt. Gita Devi Saksaria.

7. Due to financial contingencies the erstwhile partnership had decided to induct a new partner namely, Smt. Gita Devi Saksaria in order to carry with the wholesale and M.R Distributor in the name and style of the said partnership firm. The re-constituted partnership firm commenced on and from 1st February 2005. It is a partnership at will.

8. Prior to the dispute the partnership firm had three partners, namely, i) Sri Omprokash Saksaria, ii) Sri Jagadish Prosad Sharma and iii) Smt. Gita Devi Saksaria. The contribution of Omprokash and Jagadish in the said partnership firm was Rs.40,000/- each, whereas, Gita contributed Rs.3,00,000/- towards capital of the partnership firm.

9. The partnership deed in Clause 11 provides that in the event of death of any partner during the continuation of partnership, his/her heirs assigns legal representatives shall be partners in his/her place from the date of such death and there need be no dissolution of partnership but mere arrangement or adjustment of the respective shares shall be enough for the purpose of carrying on partnership business.

10. The partnership was again re-constituted on 23rd August, 2010 consequent upon the death of Jagadish Prosad Sharma on 31st July, 2010. The reconstituted deed in the recital has stated that the legal heirs of Jagadish have declined and expressed their unwillingness in writing not to participate in the partnership business as successors of their father.

11. Om Prokash expressed his unwillingness to continue due to old age and recommended his son Arun to be inducted as a partner. Arun

contributed Rs. 5.50 lakhs after being inducted as an incoming partner. Dinesh contributed of Rs.4,00,000/- towards capital. The capital contributed by Gita had remained the same.

12. The induction of Dinesh in the partnership firm was challenged by one of the sons of Jagdish, namely, Ramesh Kumar Sharma. Jagdish was survived by six legal heirs out of which except Jagdish none had challenged the induction of Dinesh in the partnership business.

13. Upon such reconstitution, it appears that approval was given by the Food and Supply Department on 10th April, 2012 to the reconstituted firm in cancellation of the earlier licence. However, the earlier licence and approval had not been disclosed in this proceeding.

14. The licence granted on 12th April, 2012 in favour of the reconstituted partnership firm has been disclosed which, inter alia, contains the following terms:-

“11. The licence will cease to be valid in the event of death or resignation of the licensee or reconstitution of a partnership firm or transfer of interest of the licensee in his business.”
(emphasis supplied)

15. Ramesh has filed the writ petition in 2013. In his writ petition, he has stated that the licence was issued in respect of the reconstituted firm in the year 2011 depriving the legal heirs of Jagdish. It is stated that in November, 2012, a representation was made on behalf of Ramesh through his son, Suraj, alleging that when Ramesh went to

Office of the District Controller he was threatened to give no objection in favour of one Dinesh who is an outsider and the share of Jagadish was also withheld from the family of Ramesh till he signed such document. He was compelled to sign an already prepared declaration and submit no objection certificate on behalf of the legal heirs of Jagadish for reconstitution of the firm by inclusion of Dinesh as partner thereof.

16. The learned Single Judge disbelieved the stand taken by Ramesh due to absence of any contemporaneous report of such coercion to any law enforcement agency and in view of the fact that belatedly in November, 2012, the son of Ramesh in his representation had raked up such story. The learned Single Judge, in fact, has recorded that Ramesh and other legal heirs had received the capital contributed by Jagadish and all other amounts that are payable to Jagadish at the time of his death without any protest and have clearly evinced an intention not to associate themselves with the partnership firm. The writ petition was filed by the time the firm was reconstituted and carried on business on the strength of the reconstituted partnership deed for almost two years.

17. The learned Single Judge dismissed the writ petition on the ground that Ramesh cannot approbate and reprobate at the same time having received capital and the share of Jagadish in the partnership firm without demur. It cannot be contended that Ramesh is a partner interested in the partnership firm and the exclusion of Ramesh in the reconstituted partnership firm was illegal. The ground for challenge in the

writ petition appears to be exclusion of Ramesh in the reconstituted partnership business and not really about the induction of Dinesh.

18. In the declaration of legal heirs/Jagadish Proshad Sharma of the legal heirs have clearly stated that they have no objection if the share of their deceased father is given to their relative Shri Dinesh and induct him as a partner in the partnership business the said declaration was made on 28th August, 2010. It appears that subsequent to the reconstitution of the partnership firm a request was made for granting approval for reconstitution of the M.R. Distributorship (partnership) firm and on the basis of such request the OSD and Ex-officio special secretary on 10th April, 2012 informed the director of DDP and S/SPIO and Supply department that the Government of Food and Supply Department have approved reconstitution of the M.R. Distributorship (partnership) firm "M/s. Mahabir Traders" by inclusion of Shri Arun Kumar Seksaria and Dinesh Kr. Agarwal.

19. In any event, it is an admitted fact that excepting Ramesh, others have not challenged the reconstitution of the partnership firm.

20. Although an appeal was preferred it was not pursued until during the hearing of MAT 71 of 2023 when the order in the writ petition was brought to our notice and thereafter FMA No. 110 of 2015 filed by Ramesh was tagged with the present appeal. In the appeal, we also could not find any plausible reply for non-inclusion of the other legal heirs of Jagadish or acceptance of the due share of Jagadish upon his death in the partnership firm.

21. On such consideration, we feel that the appeal filed by Ramesh deserves no merit for consideration.

22. The writ petition of Ramesh was dismissed on 25th July, 2014.

23. Almost after two years, one Arunava Sasmal filed a writ petition challenging the issuance of licence in favour of the reconstituted partnership firm on the ground that on the death of Jagadish, the vacancy arose and the authorities concerned instead of declaring vacancy allowed Dinesh to be inducted in the partnership firm in place of Jagadish which is not permissible under the relevant provision of the Control Order of 2003.

24. It has been alleged by Arunava that since the vacancy arose on account of death of one of the original partners of the partnership firm, such vacancy has to be filled up from the legal heirs of the deceased partner on compassionate ground, failing which, the State/respondents are duty-bound to declare a new vacancy under the provisions of the Control Order of 2003. This writ petition was allowed on the ground that licence granted to the reconstituted partnership firm is contrary to Clause 23 of the Control Order, 2003 as amended on March, 28, 2005 read with Clause 11 of the impugned licence dated 12th April, 2012.

25. The learned Single Judge was of the view that the aforesaid two clauses would make it clear that in the event of death of an existing distributor, the legal heirs can be considered only on compassionate ground and not otherwise. Moreover, reconstitution of the partnership firm would result in cessation of the licence. The learned Single Judge has

also relied upon various communications exchanged by and between the parties including the reply given through its SPIO which clearly states that an outsider cannot be included as a partner for MR Distributor on compassionate ground under the Control Order, 2003.

26. The learned Single Judge repelled the submission made on behalf of the partnership firm that Arunava was set up by Ramesh and the writ petition ought to have been dismissed on the ground of delay and that too after the introduction of Control Order, 2013 by repealing the Control Order, 2003 on the ground that the state respondents as well as the partnership firm cannot take advantage of their own wrong.

27. This order is under challenge.

28. Mr. Saptangsu Basu, learned Senior Counsel appearing on behalf of the partnership firm, has submitted that Jagadish died on 31st July, 2010 and admittedly none of his legal heirs showed any interest to become partner/(s) in the said distributorship business and had issued a no objection in favour of Dinesh for inclusion of his name as partners in the said partnership firm. It was on that basis Dinesh was included in the reconstituted partnership firm. At the relevant time, there was no bar in the West Bengal Public Distribution System (Amendment & Control) Order, 2003 for induction of an outsider as partner in the partnership firm. Clause 9 of the partnership deed permits that legal heirs of a partner can assign their right in favour of another person and there need not to be dissolution of the partnership firm but it would result in mere arrangement or adjustment of their respective shares for the purpose of

carrying on partnership business. The said clause specifically refers to the Partnership Act, 1932.

29. It was on the basis of such assignment by the legal heirs in favour of the Dinesh that the Food & Supply Department following the provisions of the Partnership Act accorded approval for reconstitution of the firm incorporating the name of Dinesh in place and stead of the legal heirs of Jagadish and upon such reconstitution being approved, the partnership firm was granted licence to carry on M. R. Distributorship business. In fact, the partnership firm was reconstituted on 23rd August, 2010 and the new licence was issued on 12th April, 2012 in favour of the reconstituted firm under Control Order, 2003. On 8th August, 2013, the Control Order, 2013 has come into force repealing the Control Order, 2003. After coming into force of Control Order, 2013 new licence has been granted in favour of the reconstituted firm.

30. The writ petition was filed on 14th September, 2016 challenging the M. R. Distributorship licence of the appellant/ partnership firm issued on 12th April, 2012 under the Control Order, 2003 i.e. nearly after four and half years from the date of the licence being issued in favour of the partnership firm.

31. Arunava has not given any explanation for such delay in filing the writ petition. Moreover, it is quite evident from the statements in the writ petition filed by Arunava that he was set up by Ramesh. In the absence of any explanation being offered, Mr. Basu submits that the writ petition could not have been allowed. The learned Single Judge has failed

to appreciate that by reason of passage of time, valuable right has accrued in favour of the reconstituted firm. The credibility of the writ petitioner was not assessed and the learned Single Judge has failed to appreciate that Arunava was an alter ego of Ramesh. Moreover, Ramesh did not show any interest to pursue the appeal unless it was directed to be listed by this Bench. Ramesh had kept quiet for so long although both Ramesh and Arunava are represented by the same advocate. It is submitted that Indian Partnership Act, 1932 never restricts induction of any outsider as partner in an existing family partnership business unless there are specific exclusionary clause in the partnership deed. The partnership deed has allowed reconstitution of the firm and it clearly suggests that any legal heirs of the deceased partner or any assignee may be inducted as partner on death of a partner. It is submitted that learned Single Judge has overlooked that the licence issued in the year 2012 has lost its force by reason of promulgation of Control Order, 2013 repealing the Control Order, 2003. The licence that was issued on 12th April, 2012 has lost its force by reason of a fresh licence being issued in favour of the reconstituted partnership firm upon promulgation of the Control Order, 2013. It is submitted that even for the argument sake, it is accepted that inclusion of an outsider is not permissible then at best on the exclusion of the third partner, other two existing partners can be allowed to continue the business as partners in stead of cancellation of the licence. It is submitted that the learned Single Judge has failed to appreciate that the partnership firm consisting of three partners can never be dissolved either

on death of one of the partners or inclusion of an outsider as the wording of the partnership deed suggests otherwise and the licence has been granted in the name of the firm having separate identity. In any event the partnership firm was not dissolved.

32. Mr. Susovon Sengupta, learned Counsel appearing on behalf of the State respondents that the Control Order, 2003 does not restrict the inclusion of any outsider in a partnership firm as unlike a sole proprietorship business a partnership firm is consisting of several partners and in the event the partnership deed is at will, the question of dissolution does not arise. Unless the circumstances mentioned in the Partnership Act giving rise to dissolution the firm arises, can never be considered as ineligible for a licence merely on the induction of a third person. It is submitted that Control Order, 2013 published on 8th August, 2013 has made it clear that in the case of induction of a new partner or substitution or exclusion of any existing partner in an existing partnership licence, the same may be considered on merit subject to the provision of the Indian Partnership Act, 1932 as amended from time to time. This would be clear from Clause 23 of the Control Order of 2003 as amended on 28th March, 2005.

33. Mr. Sengupta however, submitted that the communication made by SPIO and OSD and EO Joint Director, Food and Supply Department, dated 17th June, 2016 where the said authority in answer to a RTI application has stated that there is no such provision in the W.B..D.S (M&C) 2003 Act to include any outsider as partner in M.R

Distributorship on compassionate ground does not invalidate the licence granted to the partnership firm.

34. Mr. Sengupta submits that induction of Dinesh was not on compassionate ground but on reconstitution of the partnership firm and the reply of SPIO is to be read in that context.

35. Per contra Mr. S.N. Mitra submits that in view of Clause 11 of the licence dated 12th April, 2012 once the firm is reconstituted the licence ceased to operate. In the event, the licence ceased to operate a vacancy arises and the only way of filling up is by public notification. Mr. Mitra submits that when there is a violation of the norms prescribed by the statute the question of locus standi pales into insignificance. This has been reiterated in paragraph 16 of the decision in **Mehsana District Central Cooperative Bank Ltd. & Ors. Vs. State of Jugarat and Ors.**, reported in **(2004)2 SCC 463**. It reads as follows:-

“16. In the facts and circumstances stated above, the High Court by the impugned order issued a writ of mandamus, directing Respondents 4 and 5 to take appropriate action against the appellants in accordance with the provisions contained in the Gujarat Cooperative Societies Act and the Rules framed thereunder. We do not see any infirmity in the impugned order. The Acts and Rules are made to be followed and not to be violated. When the statute prescribes the norms to be followed, it has to be in that fashion. Converse would be contrary to law. If there is any allegation of violation of statutory rules which have been brought to the notice of the authorities and if the authorities concerned do not perform their statutory obligation, as in the present case, any aggrieved

citizen can always bring to the notice of the High Court the inaction of the statutory authorities and in such event it would always be open to the High Court to pass an appropriate order as deemed fit and proper in the facts and circumstances of the case. In the present case, the facts as alluded above, would clearly reveal that the High Court was clearly justified in issuing a writ of mandamus, which cannot be faulted.”

36. Our attention is also drawn to paragraph 14 of **Barun Ghosh Vs. Goutam Kumar Saha & Ors.**, reported in **(2011)4 WBLR (Cal) 231** to show that if it appears that the guidelines have not been properly followed it should be presumed that the persons interested have been deprived of participating in the process of selection of M.R Distributorship.

37. Mr. Mitra has also relied upon the answer to the RTI application in which it was stated that the induction of an outsider as partner to a partnership firm is not permissible.

38. The point and counter point canvassed in these appeals essentially raise two issues, namely,:-

- (i) locus of Arunava to challenge licence after four years,
- (ii) whether licence could be granted to a reconstituted partnership firm in view of the embargo in Clause 11 of the licence issued under the Control Order, 2003.

39. A partnership firm is a conglomeration of its partners. It is not a juristic person. Partnership firm is not an independent legal entity. Firm name is only a compendious name given to the partnership and the

partners are the real owners of its assets. It is, in fact, a group of individual persons described as partners. Essential ingredients of partnership is that it consists of (a) persons, (b) a business carried on by all of them or any of them acting for all and (c) an agreement between those persons to carry on such business and to share its profits. Section 7 of the Partnership Act, 1932 clearly states that where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is to be treated as “partnership at will”.

40. Chapter V of the Partnership Act, 1932 deals with incoming and outgoing partners which allows retirement of a partner in Section 32 and such retirement can take place without dissolution of the said firm if the partnership agreement provides there for which in the instant case is absent and thus retirement of a partner, would not result in the instant case a dissolution of the firm.

41. The Partnership Act, 1932 in Chapter VI provides for dissolution of a firm. The said Chapter would not be applicable in the instant case as under Section 43 a partnership at will, can be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

42. The Control Order, 2003 read with the amendment in 2005 does not refer to any partnership firm. If we read the expression “existing distributorship” to mean a partnership firm unless the firm is dissolved the question of vacancy would not arise. However, Mr. Mitra has argued

that for a partnership firm to be allowed to continue legal heirs of the deceased could be considered on compassionate ground and in the instant case the legal heirs have not been included in the partnership business. In this submission we find an echo of Ramesh through a different voice. Under the Control Order, 2013, the form of the licence is given in Form-E. The relevant Clauses are 11 and 12. The said Clauses read as follows:

“11. The licence will cease to be valid in the event of death or resignation of the licence or re-constitution/dissolution of a firm formed by a group of people or dissolution of a Co-operative Society/Self Help Group.

12. The licence, unless an application for renewal of the licence is made within the period of validity, will stand revoked after the expiry of the period of validity and in that case the licence may be renewed by the licensing authority on realization of requisite fine within a further period of one month if he thinks that the reason for non-renewal of the licence was beyond the control of the licensee.” (emphasis supplied)

43. However, in Clause 26 it, *inter alia*, provides that in the event of dissolution of the firm formed by group of people the resultant vacancy has to be notified by the District Controller (Food & Supplies) on prior approval of the partner. The dissolution of a partnership firm would depend upon the nature of the agreement between the partners as would be discernable from the partnership deed or by any of the provisions of the Partnership Act as stipulated in Chapter VI of the Partnership Act, 1932.

44. Control Order, 2013 deals with the engagement on compassionate ground in Clause 26 (vi). It reads as follows:

“vi) Engagement on compassionate grounds: In case of vacancy arising out of death or incapacitation on medical ground of any existing distributor, such vacancy shall not initially be notified. Prayer of any of the family members of the deceased incapacitated distributor having no regular means of subsistence, will be considered with preference on compassionate ground provided such prayer along with formal application in Form ‘G’ along with the annexure I & II and requisite fee is submitted within 60 days from the occurrence of such vacancy. However, the applicant should be capable of running the Distributorship smoothly.

While applying the applicant shall have to furnish "No Objection from other family members in the form an Affidavit executed before a 1st Class Magistrate except in the following cases (o) if the applicant be the spouse of the deceased licensee (b) if the ex-licensee, because of his/her being incapacitated/infirm has opted for the applicant.

The District Controller. Food and Supplies shall arrange for on enquiry to verify the eligibility of the applicant and submit the report with his opinion to the Director, DDP&S While forwarding a case on medical ground the District Controller should satisfy himself/herself on examination of the medical prescription and certificate issued by a Registered Government Medical Practitioner that the ex-licensee is not in a position to run distributorship business considering his/her health ground. The Director, DDP&S, shall send the same with his comments to the Department for necessary approval. The District Controller, Food and Supplies after having Government approval, shall issue an offer letter in the approved candidate, directing him/her to furnish recent passport size photograph(s), security deposit and licensing fee is per Clause 27(1) and Schedule-B.”

45. Clause 26(vii) deals with a partnership firm. The said clause reads as follows:

“Distributorship run by any individual person shall not be allowed for inclusion of any partner(s) in the case of induction of a new partner or substitution or exclusion of an existing partner, in an existing partnership licence, the same may be considered on merit subject to the provision of the Indian Partnership Act 1932 as amended from time to time.” (emphasis supplied)

46. The terms of the licence namely Clause 11 has to be read in conjunction with Clause (vii) of Rule 26. The reconstitution of the partnership firm ipso facto would not result in a resultant vacancy as it is subjected to a consideration on merit by the District Administration which would mean the District Controller (Food & Supplies) would consider such application on merits subject to the provision of the Indian Partnership Act, 1932. This discretion has to be exercised judiciously. This was, in our view, implicit in the earlier Control Order, 2003 as amended in 2005 since the object of making and framing such rules is to avoid trading on licence by induction of an outsider without following the process of filling up vacancy that might result due to reconstitution of the firm. The newly constituted partnership cannot be used as a modicum to facilitate trading in licence. The safeguards are in Clause 26(vii) of the Control Order 2013 dated 8th August, 2013.

47. On 9th June, 2016 Arunava made an application to the Director of DDP and S/SPIO under the Right to Information Act, 2005 for an

information as to whether an outsider can be included as a partner and can be appointed in M.R. Distributorship on compassionate ground for excluding the legal heirs of the deceased partner as per the provision of the Control Order, 2003.

In reply the S/SPIO and OSD and EO Joint Director, DDP and S/SPIO on 17th June, 2016 informed that “there was no such provision in the WBPDS (M & C) order, 2003 as to include any outsider as a partner in M.R. distributorship on compassionate ground.”

48. After the reconstitution of the firm on 2nd August, 2010 a fresh licence was issued on 12th April, 2012. It appears that Dinesh was inducted as the legal heirs of Jagadish declined to join the partnership firm. The Control Order 2003 is silent on the point of induction of an outsider consequent upon the death of one of the partners. In the instant case, the death of the partner would not automatically result in dissolution of the partnership firm. It was incumbent upon the State authorities before granting a fresh licence in favour of the reconstituted firm to find out whether it is permissible under the Control Order, 2003. In reply to the RTI application it has been clarified that there is no provision to include any outsider as the partners in MR Distributorship on a compassionate ground. However, it does not necessarily exclude the induction of a new partner and stands clarified by the Control Order 2013 which requires such induction to be considered on merit subject to the provision of the Indian Partnership Act, 1932 as amended from time to time. This consideration appears to be implicit in Control Order, 2003. In

any event, even if Dinesh was not allowed to be inducted the partnership firm would have still survived with the two partners.

49. Although the control order 2003 does not have similar provision it is quite evident that when a partnership firm is allowed a licence it cannot cease to exist on re-constitution specially when it is a partnership at will. This has been taken care in Clause (vii) of the Control Order, 2013. However, checks and balances are to be exercised allowing renewal of licence on re-constitution by induction of an outsider as the likelihood of indulging in unscrupulous trading under the garb of re-constitution cannot be ruled out. The State may issue necessary guidelines to be followed in considering the grant/renewal of licence to a re-constituted partnership firm where the incoming partner is an outsider. In the facts and circumstances of this case it shall be presumed that the authority was satisfied on merit with the induction of an outsider. In any event the partnership with the existing partners before reconstitution could have continued with the business.

50. Dinesh was not inducted on compassionate ground.

51. The writ petitioner, in our view appears to be set up by Ramesh. The credibility of Arunava is not established. He appears to be an interloper and a busy body. One has to aver and prove that in the event of a declaration of vacancy, he had the wherewithal and infrastructure to undertake the works to be performed as distributor. The pleadings are vague and unsubstantiated.

52. FMA 71 of 2023 is allowed. FMA 110 of 2015 is dismissed.

53. There is no order as to costs. Urgent Photostat certified copy of this order, if applied for, be given to the parties on an usual basis.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)