

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :-

Hon'ble Justice Partha Sarathi Sen

WPA 7087 of 2019

Utpal Ghosh

Vs.

The State of West Bengal & Ors.

With

WPA 7969 of 2019

Jogmaya Ghosh & Ors.

Vs.

The State of West Bengal & Ors.

For the petitioner : Mr. Ram Anand Agarwala, Adv.,
in WPA 7087 of 2019 : Ms. Nibedita Pal, Adv.,
: Mr. Ananda Gopal Mukherjee, Adv.

For the petitioners in : Mr. Partha Sarathi Bhattacharya, Sr. Adv.,
WPA 7969 of 2019 : Mr. Debabrata Mandal, Adv.,
: Ms. Sreetama Neogi, Adv.

For the pvt. Respondent : Mr. Ram Anand Agarwala, Adv.,
in WPA 7969 of 2019 : Ms. Nibedita Pal, Adv.,
: Mr. Ananda Gopal Mukherjee, Adv.

For the respondent : Mr. Partha Sarathi Bhattacharya, Sr. Adv.,
Nos. 6 & 7 in : Mr. Debabrata Mandal, Adv.,
WPA 7087 of 2019 : Ms. Sreetama Neogi, Adv.

For the State : Mr. Amitesh Banerjee, Adv.,
: Mr. Suddhadev Adak, Adv.

Last Heard On: 08.12.2023

Judgement On: 14.12.2023

PARTHA SARATHI SEN, J. : –

1. Both the writ petitions as filed under Article 226 of the Constitution of India are taken up together for judgement because of their identical nature of facts and circumstances, parties to the writ petitions are interrelated and involvment common questions of law.

2. For effective adjudication of the instant two writ petitions some admitted facts are required to be discussed which are as under:-

- i. Originally one Jogendra Nath Ghosh, since deceased was a MR Dealer and kerosene dealer under English Bazar Block in District Malda.
- ii. Jogendra Nath Ghosh died intestate leaving behind Biswanath Ghosh, since deceased (one of writ petitioners in WPA 7969(W)/2019), Tapan Kumar Ghosh (one of the writ petitioners in WPA 7969(W) /2019), Ajay Ghosh, since deceased, Utpal Ghosh (the writ petitioner in WPA 7087(W)/2019), Sumitra Ghosh and Jhunti Ghosh as his sons and daughters and as his legal heirs within the meaning of Hindu Succession Act, 1956.
- iii. During his life time, the said Jogendra Nath Ghosh, since deceased, made an application before the appropriate authority for transfer of the said dealerships in favour of his two sons namely; Utpal Ghosh and Ajay Ghosh, since deceased.

- iv. After the death of Jogendra Nath Ghosh , since deceased, his other four legal heirs namely; Biswanath Ghosh, since deceased, Tapan Kumar Ghosh, Sumitra Ghosh and Jhanti Ghosh jointly gave their no objection for granting appointment in favour of Utpal Ghosh and Ajay Ghosh, since deceased, in respect of the said two dealerships.
- v. Ajay Ghosh and Utpal Ghosh made a partnership firm and licence in respect of the said MR Dealership was granted to the said partnership firm namely; 'M/S Ghosh Brothers'.
- vi. On 10.03.2015 one of the partners of the said partnership firm namely; Ajay Ghosh died as a bachelor and on his demise Utpal Ghosh (the writ petitioner in WPA 7087(W)/2019) applied before the appropriate authority to continue the said dealership as a surviving partner.
- vii. On the death of the said Ajay Ghosh, (who died as bachelor) his two other brothers namely; Biswanath Ghosh, since deceased and Tapan Ghosh (the writ petitioners in WPA 7969 (W)/2019) also made joint application before the appropriate authority for grant of the dealership in their joint names. However, such prayer was rejected by the competent authority.
- viii. The said Biswanath Ghosh, since deceased and Tapan Ghosh thereafter approached this Hon'ble Court by filing WP-

26973(W)/2017 wherein a co-ordinate bench of this court passed the following order:-

“In those circumstances, both the writ petitioners as also Utpal Ghosh shall be entitled to apply for M. R. Dealership afresh for the village and P. O. Milki, P. S. English Bazar, Malda in their respective individual capacities, if however they choose to come together to form any commercially recognized body, the same may be considered in terms of sub-Clause VI of Paragraph 20 of the 2013 Control Order. In the absence of the parties coming together, their application may be considered purely in an individual capacity and as a fresh application.”

- ix. Pursuant to such order Utpal Ghosh (the writ petitioner in WPA 7087(W)/2019) and Biswanath Ghosh, since deceased and Tapan Ghosh (the writ petitioners in WPA-7969(W)/2019) made their respective applications before the appropriate authority being the Sub-Divisional Controller, Food and Supplies, Malda (SDCFS, Malda in short) who by his orders dated 12.03.2019 and 13. 03.2019 rejected both the applications as filed by Utpal Ghosh and as jointly filed by Biswanath Ghosh and Tapan Ghosh.

3. Both the sets of writ petitioners have assailed the said orders dated 12.03.2019 and 13.03.2019 as passed by SDCFS, Malda by filing the instant two writ petitions.

4. Mr. Agarwala, learned advocate for the writ petitioner in WPA-7087(W)/2019 and private respondent no.3 in WPA 7969(W)/2019 in course of his argument contended that in view of liberty given by the co-ordinate

bench by His Lordship's order dated 26.06.2018 as passed in WP26937(W)/2017 and in view of the amended provision of Clause 20(vii) of WBPDS(Maintenance and Control) Order, 2013(hereinafter referred to as 'Control Order,2013' in short)there cannot be any justification on the part of the SDCFS, Malda to reject the prayer of Utpal Ghosh being the surviving partner of the partnership firm; 'M/S Ghosh Brothers' by its impugned order dated 13.03.2019.

5. While supporting the impugned order dated 12.03.2019 as passed by SDCFS, Malda thereby rejecting the prayer of the writ petitioners namely; Biswanath Ghosh, since deceased and Tapan Ghosh in WPA 7969(W)/2019 Mr. Agarwala also draws attention of this court to the second proviso of Clause 20(vii) of the Control Order, 2013 vis-à-vis the definition 'family member(s)' as embodied in Clause (2)(m) of the Control Order of 2013. Mr. Agarwala, submits further that since the said Biswanath Ghosh, since deceased and Tapan Ghosh do not come under the purview of the definition 'family member(s)' as per Control Order of 2013, under no stretch of imagination it can be said that the said Biswanath Ghosh, since deceased and Tapan Ghosh are entitled to compassionate appointment on account of the death of their brother Ajoy Ghosh.

6. Mr. Agarwala in course of his argument places his reliance upon a judgement as passed in **MAT 760/2020 (Dilip Saha @ Dilip Kumar Saha Vs State of West Bengal)** as passed by this Hon'ble Court (where the undersigned is a part of the Division Bench). It is argued by Mr. Agarwala that in the judgement of **Dilip Saha (supra)** the Division Bench of this court

has expressly stated that in order to come under the category of 'family member(s)' within the meaning of Clause 2(m) of Control Order of 2013 a person must have to be wholly dependent on the dealer or distributor at the time of death. Mr. Agarwala, thus submits that WPA-7087 (W)/2019 be dismissed.

7. Per contra, Mr. Partha Sarathi Bhattacharya, learned advocate appearing for the respondent nos. 6 and 7 in WPA 7087 (W)/2019 and for the writ petitioners in WPA 7969(W)/2019 contended that SDCFS, Malda is very much justified in passing the impugned order dated 13.03.2019 rejecting the prayer of Utpal Ghosh holding that in the Control Order of 2013 there is no provision for conversion of partnership firm to a proprietorship firm. It is argued by Mr. Bhattacharya, that Section 42 of the Partnership Act clearly mandates that in the event of death of a partner, partnership dissolves and therefore Utpal Ghosh being the surviving partner of 'M/S Ghosh Brothers' cannot claim that the said partnership still continues. It is further argued by Mr. Bhattacharya, that the amended provisions of Control Order of 2013 as referred by Mr. Agarwala cannot have any applications in the instant two writ petitions since the cause of action for filling the instant two writ petitions arose much before 14.12.2020(with effect from 16.12.2020) being the date of publication of notification for amendment whereas the writ petitioners in WPA 7969(W)/2019 namely; Biswanath Ghosh, since deceased and Tapan Ghosh made an application for grant of dealership on compassionate ground on 31.03.2015 i.e. much before the date of publication of the relevant notification regarding amendment of the Control Order, 2013.

8. In course of his reply Mr. Agarwala, places his reliance upon a judgement dated 29.09.2023 as passed by a co-ordinate bench of this Court in WPA 23173/2023 (***Mallika Daskarmakar Pal vs. State of West Bengal and Ors.***). It is argued by Mr. Agarwala that in the judgement of ***Mallika Daskarmakar Pal (supra)*** it has been held that the amended provision of Clause 20 of the Control Order, 2013 would take effect from the date of promulgation of the said Control Order.

9. Mr. Adak, Learned advocate for the State in both the writ petitions however contended that SDCFS, Malda is very much justified in passing the aforementioned two impugned orders thereby rejecting the prayers of both the petitioners. Learned Counsel for the State thus submits that both the writ petitions may be dismissed.

10. This court has heard the learned advocates for the contending parties at length. This court has minutely perused the entire materials as placed in course of hearing. This court has also gone through the reported decisions as cited from the Bar.

11. Since a serious question of law has been raised by Mr. Bhattacharya, learned senior advocate appearing for the writ petitioners in WPA 7969(W)/2019 and for the private respondent nos. 6 and 7 in WPA 7087(W)/2019 with regard to the non-applicability of the amended provision of Control Order, 2013 in the lis before this court, this Court considers that a finding to that effect is very much necessary for effective adjudication of the instant two writ petitions.

12. A similar question arose before a Co-ordinate Bench of this court in the case of **Mallika Daskarmakar Pal (supra)** where it was held as follows:-

“Law is trite on this subject that if a substantive right is conferred to any person in any statute, that right shall be deemed to be in effect from the date of promulgation of the statute. In other words, it will be help that the amended provision was in the provision of compassionate appointment provided in Clause 20 of the WBPDS (Maintenance and Control) Order from the date of promulgation of the control order. However, in case of procedural amendment or amendment imposing any penalty will take effect on and from the date of amendment and not retrospectively. Since a substantive right has been conferred on the son’s wife to apply for grant of licence on compassionate ground on the death of her mother-in-law, the right of the son’s wife ought to have been considered taking into consideration the amended provision dated 29th November, 2022 as if it was in the control order from the date of its promulgation. In other words, amendment of substantive law conferred any right to any class of person will operate from the date when the original control order of 2013 came into force.”

13. This court considers that the proposition of law as discussed above has been correctly dealt with by the co-ordinate bench of this court. I am also in agreement with the view taken by the Hon’ble Co-ordinate bench of this court. In view of such this court holds that in both the writ petitions, amended provision of Control Order, 2013 would apply.

14. On perusal of the impugned order dated 13.03.2019 it reveals to this court that SDCFS, Malda basically rejected the prayer of the writ petitioner Utpal Singh, basically on the ground that in the office order dated 28.04.2014 read with Indian Partnership Act, 1932, there is no provision for conversion

of any partnership firm to a purely proprietorship nature on the basis of application of the said surviving partner of the partnership firm. In considered view of this Court the reason as assigned by SDCFS, Malda in its impugned order dated 13.03.2019 is contrary to the amended provision of Clause 20 (vii) of the Control Order, 2013.

15. Clause 20 of the Control Order, 2013 runs as follows:-

“20.Engagement of Dealer:-

i.....

ii.....

iiA.....

iii.....

iiiA.....

iv.....

ivA.....

v.....

vi.....

vii. Whenever-

(a) an individual licensee opt to convert its business into partnership firm for the reason of his physical incapacitation, or

(b) a licensee of a partnership firm opt to induct a new partner or substitute the name of an existing partner,

the licensing authorities may, on an application in Form C3 along with Annexure-l, requisite fee as prescribed in Schedule A and corroborative documents as per Checklist made by the licensee in this behalf, allow him to do so on examination of the enquiry report in Form L2 and comments of the SCF&S in Form M2, with the approval of the Director, if and only if any of the family member of licensee

having no regular means of income is inducted or substituted as partner and not otherwise:

Provided that in case of death of one of the partner of a partnership firm comprising of only two partners having the dealer's license, the surviving partner shall reconstitute the partnership firm by inducting only the family member of the deceased partner having no regular means of income and not otherwise:

Provided further that-

(A) in case of death of a partner of partnership firm having the dealer's license, the licensing authorities may, on an application made by the surviving partner, allows him to continue the business for a period of ninety days or till the new license is granted, whichever is earlier;

(B) in case of death of a partner of partnership firm having the dealer's license and if no eligible family members found to become the partner or partners, as the case may be, of the said partnership firm, the surviving partner, may apply for the conversion, before the licensing authority, and upon satisfaction of the licensing authority, the said surviving partner will be allowed to continue the business, as a sole licensee, subject to the approval given by the [Director, DDP&S] in this behalf:

Provided also that in case of death of an individual licensee, the eligible family member or members, as the case may be, may apply before the licensing authority, for running its business, either as an individual licensee or as the registered partnership firm, subject to the approval given by the '[Director, DDP&S] in this behalf.]"

16. At this juncture the amended provision of 'family member(s)' as defined in Clause 2(m) of the Control Order, 2013 is required to be looked into and the same is reproduced hereunder:-

“(m) “family member(s)” means-

- i. Spouse; or*
- ii. parents; or*
- iii. son (including son legally adopted before death or incapacitation);or*
- iv. widow of pre-deceased son; or*
- v. daughter (including daughter legally adopted before death or incapacitation, divorced daughter and widowed daughter),*
who is wholly dependent on the dealer or distributor at the time of death;}”

17. The words ‘family member(s)’ as defined in Clause 2(m) of 2013 Control Order has been dealt with in a judgement passed by the Division Bench of this High Court in **MAT 842/2022 (Gurupada Das Vs. State of West Bengal and Ors)** where the Hon’ble Court expressed the following view:-

“14. Now the most important question is what is the meaning of “No Objection” from other family members. Family members have been defined in Clause 2 (m) of the 2013 Control Order which reads thus: 2.(m) “Family members” means spouse, dependent parents, dependent sons and daughters for the purpose of considering engagement as Dealers/Distributors on compassionate ground. The most important word in the definition is the word ‘dependent’. If any of the family member was not dependent on the deceased on the date of his death, his no objection is not necessary for consideration of issuance of licence in favour of any of the legal heir who has applied in Form C along with Annexure-I of the 2013 Control Order. If any of the sons or daughters who are dependent they are required to file “No Objection”. If we read paragraph 2 of sub-Clause (vi) of Clause 20 in conjunction with Clause 2 (m), it would be clear that only sons and 14 daughters who were dependent on the deceased on

the date of his death are required to file “No Objection” and not all family members.”

18. On conjoint perusal of the definition of ‘family member(s)’ as mentioned in Clause (m) of the Control Order, 2013 and as explained in para 14 of the judgment of **Gurupada Das (supra)** this court finds that under no stretch of imagination the writ petitioners of WPA 7969(W)/2019 i.e. Biswanath Ghosh, since deceased and Tapan Ghosh come under the purview of ‘family member(s)’ and therefore in view of the second proviso of Clause 20 (vi) of the Control Order, 2013 Utpal Ghosh, the writ petitioner in WPA 7087(W)/2019 is very much entitled for applying for the conversion as a surviving partner for continuing the said MR Dealership as a sole licensee. This court further holds that Section 42 of the Partnership Act has got no manner of application in these two cases in view of specific provision for continuance of the MR Dealership business by the surviving partner of a partnership firm in the Control Order, 2013.

19. In view of the discussion made hereinabove this Court finds sufficient merit in WPA 7087(W)/2019 and the same is hereby allowed on contest.

20. This court however finds no merit in WPA 7969(W)/2019 and the same is hereby dismissed on contest.

21. As a result the impugned order vide memo no.291/SCF(M)/2019 dated 13.03.2019 passed by SCDFS, Malda stands hereby set aside.

22. However, the impugned order vide memo.288/SCF(M)(19) dated 12.03.2019 as passed by SCDFS, Malda stands hereby affirmed.

23. In view of allowing of WPA 7087(W)/2019 SCDFS, Malda is hereby directed to issue licence of the MR Dealership in the name of the writ petitioner Utpal Ghosh which stood in the name of 'M/S Ghosh Brothers' of Village and P.O Milki, P.S English Bazar, Malda, within a period of two months from the date of communication of this order.

24. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(Partha Sarathi Sen, J.)