IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 19416 of 2022

KAB Food Agency & Anr.

Versus

State of West Bengal & Ors.

For the petitioner	:	Mr. Shyamal Sarkar Mr. Ramesh Dhara Ms. Mousumi Chowdhury .....Advocates
For the State	:	Mr. Susovan Sengupta Mr. Subir Pal .....Advocates
Heard lastly on	:	02.12.2022
Judgment on	:	15.03.2023

Jay Sengupta, J.:

1. This is an application under Article 226 of the Constitution of India praying for directions upon the respondents to rescind, recall and withdraw the impugned notification published in the Website and vacancy notification dated July 29th 2022.

2. On 01.12.2009, the respondent authority issued a public notice inviting offers for appointment of authorised wholesalers for the areas Asansol, Burnpur and Kulti. On 29.01.2010 the petitioner firm, being a successful candidate, was appointed as an authorised wholesaler at the location and the petitioners was granted relevant licences including licence under the West Bengal Urban Public Distribution System (Maintenance and Control) Order, 2013. The petitioner has been carrying on this business by investing substantial sums of money. The firm was being issued advice list every month for supply of articles to the Ration Cards, through tagged dealers. Even in August 2022, the petitioner firm was issued an advice list. However, thereafter the State Government published in its Website that they are going to notify vacancy in respect of 25 areas under the 2013 Control Order. On 29.07.2022, the State Government published a vacancy notification inviting application for appointment of wholesalers for the area Kulti-Burnpur.

3. Mr. Shyamal Sarkar, learned senior counsel appearing on behalf of the petitioner submitted as follows. First, no action could be taken under the Control Order of 2013 as the Control Order of 2015 had already come into force. The petitioners had invested a lot in the project. They employed about 42 persons and were even paying for their provident fund and gratuity. If at this stage the area of operation was curtailed, then the same would cause severe prejudice to them. Besides, the process of declaring vacancy was not clear. In fact, there was no need to declare vacancy in the particular area and for this declaration of vacancy. The conditions of para

17 of the 2013 Control Order were not satisfied. The approach of the respondent authorities had been absolutely wrong. Number of Ration Cards was an absolutely fortuitous circumstance. Ration Cards were not tagged with the wholesaler, those were tagged with dealers. It were the dealers that a wholesaler dealt with. The power to promulgate a Control Order came from Section 3 of the Essential Commodities Act. Only the Central Government could do so under Section 3 of the said Act. 2001 Control Order delegated certain powers to the States pursuant to which the State Control Order of 2013 was introduced. Thereafter, 2001 Control Order was superseded by the Central Control Order of 2015. There was a big difference in the two control orders. The concept of delegation of powers differed in the two. Here, the hands of the statute were more tied. Even if one went by the 2013 Control Order, para 29 of it could be referred to. This dealt with actions in case of irregularity. Without anything of this sort having happened, the petitioner's volume of business was reduced. An issue was raised regarding transport of goods. In fact, there was a rebate available for transport beyond 8 kilometers. Therefore, the wholesaler need not be of the nearby place. For a place beyond 20 kilometers, an undertaking was to be given not to claim rebate. The State was duty bound to show under which provision it was curtailing the petitioner's business. Reliance was placed on a decision reported at 79 CWN 883. Article 19(1) (g) of the Constitution was higher than Article 14. A reference might be made to the decision reported at (2007) 3 CHN 476. In the instant case, the proposal in question was not disclosed. It was settled law that if a document was not disclosed in the writ petition,

the persons supposed to disclose the same would be estopped from relying on it. Reliance was placed on the decisions reported at (1988) 4 SCC 534 and (1994) 1 SCC 1. There were, however, inconsistencies in the opposition where it was claimed that creation of vacancy was an administrative decision. There was no allegation whatsoever that the petitioner was not acting in public interest or was not being able to cater to anyone. On the question of promissory estoppel and vested interest, reliance was placed on the decisions reported at (2004) 6 SCC 465 and (2011) 6 SCC 570. The word 'supersedes' meant 'repeals' (Blacks Law Dictionary). The 2015 Control Order came after the NFS Act. Therefore, 2001 Control Order mentioned therein should be read as the Control Order of 2015. On this, reference might be made to Section 8 of the General Clauses Act. Reliance was placed on the decision reported at (2017) 11 SCC 62. Even the Control Order of 2015 did not have any provision for reducing business. Section 24 was not applicable. There was indeed inconsistency between provisions regarding licensing in the Control Orders of 2001 and 2015. On the question of vested right, reliance was placed on a decision reported at (2011) 6 SCC 570. While reading a judgment one had to remember that what was decided in a case was not to be treated as statue. Reliance was placed on (2006) 1 SCC 368. The decision in Gour Chandra Gorai (supra) was distinguishable in as much as the Control Order of 2013 did not come by then. In Gitashri Dutta's Case, Civil Appeal No. 4254 of 2022, the facts were completely different in as much as they were only selected and therefore, there was no vested right.

The averments of facts made in this regard could not be sufficiently dealt with by the petitioner.

4. Mr. Susovan Sengupta, learned counsel appearing on behalf of the State, submitted as follows. Section 3 (1) of the Essential Commodities Act was indeed the fountain head of all powers. In 2013, National Food Security Act was propounded. Section 24 referred to the obligation of the State Government for food security. In this Act the Control Order of 2001 was referred to. Therefore, even if the Control Order of 2001 went, 2013 Control Order would still remain. In fact, if renewal of licence under the 2000 Control Order was found invalid then the petitioner's licence would also go. Neither the Central Act nor the Central Control Orders or the State Control Orders, 2013 gave the right of getting minimum number of dealers. Likewise in case of dealers, there was no right to have minimum number of consumers to be tagged with them. Vested right as claimed by the writ petitioners was not at all available. The writ petitioners herein were licensees only. Even if any de-tagging of such number of FPS dealers within the subject area pursuant to vacancy notice dated July 29, 2022 be made, such course of action regarding de-tagging could not be held to be arbitrary as the process was being initiated at the behest of the State respondents culminating in the issuance of notice of vacancy. Such course of action did not offend either any constitutional provision or any statutory provisions with regard to declaration of vacancy of wholesaler for those two subject areas i.e. Kulti and Burnpur. The wholesaler vacancy was purely within the domain of the administrative discretion of the Department. There were two existing plenary legislations i.e. Essential Commodities Act, 1995 and the National Food Security Act, 2013. Both the Acts in question as stated above empowered the States including the State of West Bengal to act with regard to maintaining or increasing supply of any essential commodities or for securing their distribution and availability at fair prices. Sub-section(1) of Section 3 of the Essential Commodities Act, 1955 was the fountain of all the powers regarding maintaining or increasing supplies of any essential commodities or for securing their distribution and availability at fair prices and Section 5 of the said Act was with regard to delegation of powers in favour of the State Government or such officer or authority sub-ordinate to the State Government. Even if the Central Control Order 2001 were not there at that point of time that did not debar the State of West Bengal to promulgate State Control Order of 2003 (since repealed). Likewise, the State Control Orders, 2013 being promulgated by the State of West Bengal and not being contrary to either the provisions incorporated in the E.C. Act, 1955 or the provisions incorporated in the NFSA, 2013, the same were still subsisting. The Central Control Order, 2001 and the State Control Orders, i.e. 2013 Control Orders were treated to be sub-ordinate legislations. The Central Government issued the Targeted Public Distribution System (Control) Order, 2015 on 20.02.2015 empowering the State Government to act in terms of the provisions of the said Control Order and such provisions incorporated in the Central Control Order could not be an exhaustive one and such Control Order was also a sub-ordinate legislation. As per the provisions incorporated in the National Food Security Act (NFSA), the State

Government had been bestowed upon with all the powers as envisaged in sub-section (1) of Section 3 of the Essential Commodities Act. The State Control Orders, 2013 were very much in existence in view of Section 24 of the Central Clauses Act, 1897 and there was no subsequent notification superseding the provisions incorporated in the State Control Order, 2013. Even if no State Control Order had been promulgated in terms of TPDS Control Order, 2015, the existing State Control Orders, 2013 were still in force in view of the fact that certain provisions of NFSA were yet to be implemented fully till date and as such, there was no scope of supersession of Central Control Order, 2001 in view of the proviso to sub-clause (2) of Clause 1 of the TPDS Control Order 2015. Reliance was placed on the decision dated 08.11.2016 passed in the matter of 31930(W) of 2013 (Gour Chandra Gorai & Ors. Vs. The State of West Bengal).

5. I heard the submissions of learned counsels appearing on behalf of the parties and perused the writ petition, the affidavits and the written notes of submissions.

6. The NFS Act, 2013 referred to the Central Control Order of 2001 because by the time the former was promulgated, the subsequent Targeted Public Distribution System Act of 2015 had not come into force. Therefore, the reference does not amount to a post-2015 revalidation of the Central Control Order of 2001.

7. The West Bengal Urban Public Distribution System (Maintenance and Control) of 2013 has, thus, spent its force as the same had been brought in pursuance of the said Control Order. The State Government is indeed yet to formulate a Control Order in terms of the Central Control Order of 2015.

8. However, this does not mean that the entire Public Distribution System would have to come to a grinding halt.

9. An Hon'ble Division Bench of this Court, in Sekh Abdul Majed vs. State of West Bengal & Ors., 2022 SCC Online Cal 3030, laid down as follows – "54. When learned Advocate General being the highest officer of the State and supposed to be in know of the facts is submitting that 'NFS Act' has not yet been implemented in full in the State, in absence of positive averments in the pleadings in the writ petition by the petitioner-appellant, we cannot simply deny the assertion made by learned Advocate General. Clause 2 of 'Central Control Order, 2015' clearly negated the contention raised by Mr. Kar, learned senior counsel appearing for the appellant and it cannot be held that 'Rural Control Order, 2013 and 'Urban Control Order, 2013' are non-existent in view of supersession of 'Central Control Order, 2001'. In view of such fact the amendment carried out by the State Government in both the aforesaid Control Order of 2013 cannot be held to be invalid.'"

10. Therefore, till the NFS Act is fully implemented in the State, one may fairly continue to take steps in terms of the State Control Orders of 2013.

11. Thus, it cannot be said that the impugned vacancy notification is bad simply because it was passed in terms of the State Control Order of 2013.

12. Next comes the question of whether the petitioner firm could hold on to its wholesale business for the larger area simply because it was engaged to do so at a particular point of time. It appears that the petitioner firm was engaged in such capacity to operate in three different sub-areas of the Asansol sub control, namely Asansol, Kulti and Burnpur. There is also no difficulty in accepting that the petitioner must have spent a substantial sum of money to build the infrastructure and operate the business. The petitioner firm has carried on such business since 2010 and must have earned returns from the same keeping in mind the risks involved in any such business. However, it is also true that the petitioner is a licensee engaged by the State for a particular purpose subject to certain terms and for a particular period of time, the licence being renewable from time to time. But, there is no law which grants the petitioner an absolute right to hold on to such business in perpetuity. Such business would obviously be subject to the reasonable policy decisions made by the State.

13. It is also quite acceptable that the number of cards or, for that matter, the volume of business attached to a particular entity is a fortuitous circumstance. It may go up or it may come down for a varied number of reasons. However, the averments of the State at paragraph 13 of its Opposition cannot be overlooked either. The State claimed that at the time of initiation of the proposal for creation of wholesaler vacancy at Burnpur and Kulti sub areas, the ration card population tagged with the petitioner firm was 45,2145/- and even after detagging of the ration card population of Burnpur and Kulti sub areas, the ration card position of the petitioner firm would be to 2,55,002/-, which was more than the ration card position of other wholesalers operating in the Asansol sub control. But, the factual aspect referred to above could not be disputed by the petitioner firmly in Reply.

14. The present action of the respondents was not a penal one. However, if a periodic assessment of ration card position of the wholesalers and rationalisation of ration cards is found necessary for the smooth functioning of the Public Distribution System, it shall be well within the administrative discretion of the department to do so as a matter of policy. Thus, the State would also retain the discretion whether to engage another wholesaler for the sub areas or not. After all, a particular entity cannot claim a monopoly over the ration card population of a particular area.

15. The policy of State to encourage to different entities to cater to the needs of the people under the Public Distribution System, thus preventing monopolies in this, is quite sound and well tested. This Court does not find any procedural flaw or arbitrariness in such policy decision or in issuing the impugned vacancy notification. This Court would, thus, desist from interfering with such fair and reasonable policy decisions of the Executive.

16. In view of the above discussions, I do not find any merit in this application.

17. Accordingly, the writ petition is dismissed.

18. However, there shall be no order as to costs.

19. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(Jay Sengupta, J.)

Later

After delivery of the judgment, Mr. Dhara, learned counsel for the petitioner, prays for a stay of this order.

The prayer is considered and is rejected.

Let this order be treated to be a part of the judgment delivered earlier today.

(Jay Sengupta, J.)

S.M