IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 21905 of 2022
M/s Intercity Agencies Private Limited & Anr.
Versus
The State of West Bengal & Ors.

For the petitioner	:	Mr. Ashok Kr. Banerjee Mr. Ramesh Dhara Ms. Mousumi Choudhury .....Advocates
For the State	:	Mr. Susovan Sengupta Mr. Subir Pal .....Advocates
Heard lastly on	:	17.11.2022
Judgment on	:	14.02.2023

Jay Sengupta, J.:

1. This is an application under Article 226 of the Constitution of India praying for direction upon the respondent authorities to rescind and/or recall and/or withdraw the impugned notification published in the website and the vacancy notification dated 29.07.2022.

2. Mr. Ashok Kumar Banerjee, learned senior counsel appearing on behalf of the petitioners, submitted as follows. This was an application challenging a vacancy notification no. 445/DR/SSLC/54/22 dated 29th July 2022 in respect of area - Jadavpur and 447/DR/SSLC/54/22 dated 29th July 2022 in respect of area – Haltu, issued under West Bengal Urban Public Distribution System (Maintenance and Control) Order 2013, made in terms of the Public Distribution System (Control) Order, 2001, since superseded by the Targeted Public Distribution System (Control) Order, 2015, although the petitioner firm was already engaged in the same area as authorised wholesaler in the year 2015. The vacancy notifications were without jurisdiction, barred by the principle of promissory estoppel and without authority of law. Pursuant to the vacancy notification, the petitioner firm, being the successful candidate, was appointed as an authorised distributor on October 17, 2013 and was issued a licence. The petitioner firm invested crores of rupees for building the infrastructure for the said business including three godowns in accordance with the standards laid down by the authority, office room, loading and unloading place, truck to reach the foodgrains to the doorstep of the dealers in accordance with the conditions of the appointment. The petitioner engaged direct employees and even paid provident fund and Employees State Insurance with the appropriate authorities. The petitioners' firm successfully ran the distributorship business in the areas, without any complaint from any corner. Upon being satisfied, the State Government granted approval in terms of the West Bengal Urban Public Distribution System (Maintenance and Control) Order 2013, in favour of the petitioner firm to cater to the FPS dealers of the areas in question in order to comply with the National Food Security Act, 2013 and also directed to execute door-step delivery to the FPS dealers under Targeted Public Distribution System by an order dated January 15, 2015. The engagement/selection of the petitioner's firm, to cater to the FPS dealers of the areas in question, constituted an assurance and/or promise by the respondents and based thereon, the petitioner firm acted to its detriment and any infringement of such right is violative of the principle of promissory estoppel and contrary to the contract and such vested right cannot be taken away by any administrative fiat and/or discretion, as the respondents were seeking to do. Reliance was placed on the judgment reported at (2004) 6 SCC 465. The question of creating new vacancy for a wholesaler did not arise as the petitioner firm was already selected and was operating in the said sub-control area with substantive capacity for a number of years. Reliance was also placed on (1980) 3 SCC 174. The 2013 Control Order was made by the State Government in terms of delegation of powers made in Public Distribution System (Control) Order, 2001 (being GSR No. 630 (E) dated August 21, 2001 made by the (Central Government). The Central Government enacted the National Food Security Act, 2013 to provide for food and nutritional security in human life. The Central Government made the Targeted Public Distribution System (Control) Order, 2015 to implement the NFS Act, 2013. The 2015 Control Order superseded the 2001 Central Control Order. The State Government had not yet made any Control Order under the powers delegated under the 2015

Central Control Order. However, the licence and other existing rights were continuing in terms of the saving clause of the 2015 Central Control Order. The petitioner firm was an authorised agency approved by the State Government within meaning of the 2015 Central Control Order and was carrying on business as such. The said vacancy notifications were issued under 2013 Control Order by the State Government in exercise of powers delegated by the 2001 Central Control Order. The 2001 Central Control Order was superseded by the 2015 Central Control Order. After supersession of 2001 Control Order, except as respects things was done or omitted to be done, the 2013 Control Order could not survive. Therefore, the vacancy notice issued by the State respondents under Control Order, 2013 was without jurisdiction and non est in the eye of law. Since the State respondents admitted that the petitioner was selected in accordance with law to comply with the National Food Security Act, 2013 and did not deny any of the averments made in the writ petition in the affidavit, on this ground the impugned vacancy notices were liable to be set aside.

3. Mr. Susovan Sengupta, learned Senior Government Advocate representing the State, submitted as follows. That M/s Intercity Agencies Pvt. Ltd., Sonarpur was admittedly a distributor having a license issued under the WPDS (M&C) Order, 2013 and operated within the District of South 24 Paraganas under the District Controller, Food & Supplies, with 42 numbers of FPS dealers. It was allowed to execute doorstep delivery to the TPDS outlets (Fair Price Shops) for Jadavpur and Haltu sub-areas having 57 and 53 numbers of FPSs, respectively under Kolkata Sub-Control, as per order dated January, 15, 2016 of the Director of Rationing, F&S Department and such engagement/tagging was purely temporary in nature and the said engagement/tagging was not done pursuant to any tender and/or advertisement floated at the instance of the Director of Rationing, F&S Department against those sub-areas. Such engagement in favour of the said Agencies regarding two sub-area, i.e. Jadavpur and Haltu was in effect tagging of number of FPS dealers within the said area and as such, no vested right was conferred and/or created in favour of the said Agencies. Even any de tagging could not be held to be arbitrary as the process being initiated at the behest of the State Respondent culminating in the issuance of notice of vacancy of wholesaler for those sub-areas had been made in fair and transparent manner. Besides, the writ petitioner, i.e. the said Agencies, under no circumstance, could challenge the wholesaler vacancy notice dated 29.07.2022 as admittedly the said Agencies was a distributor within the meaning of WBPDS (M&C) Control Order, 2013 and said Agency could not participate in those sub-area in terms of law inasmuch as the vacancy in question belonged to the sub-area within the meaning of WBUPDS (M&C) Control Order, 2013. There were now two existing plenary legislations i.e., Essential Commodities Act, 1955 and the Nation Food Security Act, 2013. 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 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 and on the basis of the Central Control Order, the State respondent had promulgated the Public Distribution System (Maintenance and Control) Order, 2003. Subsequently, after repealing of the said Control Order, 2003, two separate Control Orders were given effect to i.e. one for the Rural area and another for Urban area and those two control orders 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 so as to ensure access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto. Most of the provisions incorporated in the NFSA empowered the States including the State of West Bengal to comply with the provisions in matter of distribution of foodgrains to the people at large and the NFSA was a plenary legislation and in the said NFSA the relevant provisions of clause (c) of sub-section (5) of Section 24 empowered the State respondent to establish institutionalized licensing arrangements for fair price shops in accordance with the relevant provisions of the Central Control Order, 2001 made under the Essential Commodities Act, 1955 as amended from time to time so as to ensure efficient operation of the Targeted Public Distribution System and therefore, assuming but not admitting, that the PDS Control Order, 2001 was superseded in view of Central TPDS Control Order, 2015, did not have legal standing as the TPDS Control Order, 2015, was a sub-ordinate legislation and could not override the provisions contained in the plenary legislation i.e., the NFSA 2013. Accordingly, the State Control Orders 2013 was very much in existence in terms of Law. 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. Reliance was placed on (i) Judgment dated 20.04.2022 in the matter of Civil Appeal No. 4254 of 2022, State of West Bengal vs. Gitashree Dutta (Dey); (ii) Judgment dated 08.11.2016 in the matter of WP 31930(W) of 2013, Gour Chandra Gorai & Ors. Vs. The State of West Bengal.

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

5. The Central Control Order of 2015 has superseded the Central Control Order of 2001. Therefore, the State Control Orders of 2013 promulgated in pursuance of the Central Control Order of 2001 have also spent their force. But, the State Government is yet to formulate a Control Order in terms of the Central Control Order of 2015. However, that does not mean that the entire Public Distribution System of the State would come to a grinding halt.

6. In Sk. Abdul Majed versus State of West Bengal and Ors., 2022 SCC Online Cal 3030, a Division Bench of this Court 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.*"

7. In the said case as well as in the present proceeding, the State has unequivocally averred that the NFS Act has not been fully implemented in the State.

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

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

10. Now, the question arieses whether the petitioner had a right hold on to their distributorship for the additional areas of Jadavpur and Haltu simply because they have been allowed to do so for some time.

11. It appears that the petitioners were asked to deal with the additional areas as a temporary measure and not by the usual procedure for filling up of vacancies after giving public notice. Such tagging of number of FPS dealers within such areas cannot be said to have vested any right on the said agencies. Tagging and de-tagging are part of the whole process and are done in regular course. However, by the Act of a temporary tagging of some FPS dealers, the petitioners cannot claim a right to continue with the same for a longer period of time or for anytime to come.

12. The petitioners have claimed to have made significant investments in their business. However, they have done so knowing fully well that it was a temporary measure only by which such extra areas were added to the petitioners for the time being. They also must have earned profits out of such investments. This would relate more to the petitioners appetite for taking risk in business knowing fully well that the additional arrangement was temporary in nature. This cannot, by any stretch of imagination, amount to an entitlement, far less a promissory estoppel on the part of the State, to carry of such additional additional business for eternity.

13. Besides, the policy of the State to encourage diverse entities to cater to the people through Public Distribution System, thus preventing monopolies in this, is quite sound and well tested. This Court would hate to interfere with such a fair and reasonable policy decision of the Executive.

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

15. Accordingly, the writ petition is dismissed. There shall, however, be no order as to costs.

16. 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.)

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