

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 22336 of 2022
Nandigram Cooperative Marketing Society Limited and Anr.
Versus
The State of West Bengal & Ors.

For the petitioner : Mr. Arjun Roy Mukherjee
Ms. Debapriya Mitra
.....Advocates

For the State : Mr. Susovan Sengupta
Mr. Subir Pal
.....Advocates

Heard lastly on : 16.05.2023

Judgment on : 02.11.2023

Jay Sengupta, J.:

1. This is an application under Article 226 of the Constitution of India praying for direction upon the respondent authorities to cancel and withdraw the Notification dated 01.09.2022 and all consequent actions and correspondences in connection with the same.

2. Learned counsel appearing on behalf of the petitioners submitted as follows. The petitioner no. 1, a registered Co-operative Society, was an MR distributor in Nandigram covering Nandigram I and II Blocks and their

license was valid till 31.12.2023. The petitioner, pursuant to a direction, shifted their godown from Nandigram- II Block to Nandigram -I Block in 2016 upon incurring a substantial expenditure. Such relocation was approved by the Director, District Distribution, Procurement and Supply [DDP&S] as was evident from the letter dated 05.10.2016 issued by the O.S.D. & E.O. Jt. Director [License), DDP&S. Immediately thereafter the respondents by a notification dated 05.07.2019 declared vacancy for Nandigram II Block and invited applications for filling up the said vacancy. The petitioners moved a writ petition being WPA 15363 of 2019 challenging the notification dated 05.07.2019 and during pendency of the said writ petition the respondents vide order dated 13.08.2019 cancelled the said notification resulting in disposal of the said writ petition on 16.08.2019. The respondents once again issued a notification on 01.09.2022 declaring vacancy for Nandigram - II Block. The petitioners filed the present writ petition challenging the said notification, inter alia, on the grounds of illegality, irrationality, and procedural impropriety pursuant to an order dated 30.09.2022. The respondents filed their first report and petitioners filed an exception in connection thereto. Paragraph 3 of the said report stated that the godown of the petitioner was located at Amtala ie, around 40 KM wway from Nandigram -I Block. The District Controller's response regarding Nandigram-1 Block, despite the vacancy being declared for Nandigram II Block, showed a complete lack of thoughtful consideration. Moreover, such statement was wholly incorrect in as much as the maximum distance of Prakash Jana, one of the dealers out of total 51 dealers from the

location of the godown was 18 KM which was well within the permissible distance which could be corroborated from a memorandum dated 09.10.2021 issued by the District Controller, Purba Medinipur. By the said memorandum dated 09.10.2021 the District Controller asserted the distance of all ration dealers from the godown of the petitioners. Serial numbers 1 to 8, 11, 15, 17, 19, 20, 24, 25, 28, 31, 32, 36, 37 and 47 were ration dealers whose shops were located within the jurisdiction of Nandigram II Block and distance between the godown and their respective shops were all less than 20 km from the godown which was the permissible limit as per clause 6[1][iii] of the notification dated 01.09.2022. Therefore, the contents of the said report were contrary to records and thus, perverse. Pursuant to an order dated 25.11.2022. The respondents filed their second report and the petitioners filed an exception in connection thereto. In paragraph 3 of the said supplementary report the respondents referred to a comprehensive chart which purportedly provided the approximate distances of FPSs of Nandigram-II Block from the petitioners' godown. The distances of FPS mentioned against S). Nos. 5 Bimal Kumar Maity), 6 (Debasis Karan], 7 [Dilip Manna] and 14 [Prakash Jana] were 22 km, 34 km, 21 km and 26 km, respectively whereas the same was contrary to the Memorandum dated 09.10.2021 issued by the erstwhile District Controller based on Google Maps which clearly said that the distances against those FPSs were 13 km, 14 km, 14 km and 18 km respectively. Clause 26[i] of the said Control Order, 2013, as amended by a notification dated 12.04.2022, stipulated the following:- "If it appears necessary for the District Administration to declare

a new vacancy of Distributor for better functioning of Public Distribution System in a particular area, the concerned District Controller, Food and Supplies, shall submit the proposal of such vacancy to the Director with the opinion of the concerned District Magistrate. The Director shall examine the proposal, and send it to the State Government with his specific views for consideration. On receipt of the proposal of the vacancy, if the State Government is satisfied, it may approve the vacancy and communicate its decision to the Director." Clause 26[ii] of the Control Order, 2013 clearly enunciated that if the District Administration thought that they require to appoint a new distributor to make the Public Distribution System work better in a particular area, the District Controller of Food and Supplies would propose the vacancy to the Director along with the opinion of the District Magistrate. In view of the above, the impugned notification dated 01.09.2022 was liable to be set aside having been suffered from following illegalities: - i] The District Administration and District Controller, Purba Medinipore, did not exercise their discretion in accordance with the law as stipulated in Clause 26[ii] of the Control Order, instead, they followed the orders of higher authorities in violation of the Control Order. Such action also suffered from the vice of doctrine of dictation. [[a] AIR 1936 Privy Council 253 (Nazir Ahmad Vs. King Emperor); [b] 40 CWN 17 (Maniruddin Bepari Vs. The Chairman of the Municipal Commissioners.) ii] The actions of the respondents also suffer from the vice of doctrine of dictation. [[a] 1951 SCC Online SC 70 (Commissioner of Police, Bombay Vs. Gordhandas Bhanji); [b] 2013 [7] SCC 25 (State of Madhya Pradesh and Ors. Vs. Sanjay

Nagayach and Ors.)) iii] Power exercised in contravention of statutory procedure should be quashed as it would be without jurisdiction. [AIR 1967 SC 295 / 1966 Supp SCR 311 (Barium Chemicals Ltd. Vs. Company Law Board)]. iv) If supporting documents were not provided alongside the pleading, the point taken in the affidavit in opposition might be disregarded. [[a] 1988 [4] SCC 534 (Bharat Singh and Ors. Vs. State of Haryana and Ors.)].

3. Learned counsel appearing on behalf of the State respondents submitted as follows. As per records, the approved godown of the MR Distributor namely, Nandigram Co- operative Marketing Society being the writ petitioner no. 1 herein was at Amtolia at Nandigram-1 Block, whereas the vacancy declaration Notification for MR Distributorship dated September 01, 2022 related to Nandigram-II Block. The godown of the writ petitioner no. 1 herein was located at Amtolia, Nandigram-1 Block with a godown capacity of around 1000 MT and the writ petitioner no. 1 herein had 51 tagged dealers and 3,69,201 beneficiaries of Nandigram-I and II Blocks and for which it was difficult for the said distributor to serve this huge number of dealers as well as beneficiaries of two large blocks i.e. Nandigram-1 and Nandigram-II and considering the interest of the public distribution system beneficiaries as well as taking into the aforesaid facts in question, the approval was made by the then District Magistrate, Purba Medinipur at the material point of time and a proposal for MR Distributorship vacancy at Reapara, Nandigram-II Block was sent to the Food & Supplies Department and the same was approved by the Government in the year 2019 and the

MR Distributor vacancy was declared first in the year 2019. All the applications submitted for the said vacancy were cancelled before declaration of any successful candidate pursuant to such earlier vacancy as mentioned above in the said place in question i.e. Reapara, Nandigram-II Block. However, by taking into consideration of the interest of the PDS beneficiaries again the declaration of vacancy was made at the same place i.e. Reapara, Nandigram-II Block and for which Notification was issued on September 01, 2022 and before declaration of such vacancy, the District Administration felt necessary to declare such new vacancy for better functioning of PDB in a particular area. It is pertinent to mention that as per Clause 26(ii) of the West Bengal Public Distribution System (Maintenance & Control) Order, 2013, the duty cast upon the District Administration for declaration of vacancy of Distributorship as stated above, by taking account of the interest of the PDS beneficiaries of a particular area after obtaining due approval from the State Government. Hence, declaration of distributorship vacancy at Nandigram-II Block was not a contrary to the West Bengal Public Distribution System (Maintenance & Control) Order, 2013. There was no arbitrariness or malafide on the part of the State respondents to declare such vacancy at Reapara under Nandigram-II Block by taking into consideration of the facts that one M/s. Papiya Enterprise who happens to be the MR Distributor for Panskura area, Purba Medinipur had 3,70,545 beneficiaries (Ration Cards) tagged with it and one M/s, Somesh Santra and Ramesh Santra who happened to be the MR Distributor for Mahishadal and Chandipur area, Purba Medinipur had 4,33,248

beneficiaries (Ration Cards) tagged with it and in both the areas namely, Panskura and Chandipur, Purba Medinipur, fresh MR Distributorship vacancy had been declared in terms of the Notification being issued at the behest of the State respondents. In terms of the order of the Governor, State of West Bengal, the then Principal Secretary and Food Commissioner of Government of West Bengal vide memo No. 796- FS/Sectt/Food/14R-06/2015 dated Kolkata, the 12th March, 2015 published a Memorandum stating inter-alia to the effect that the National Food Security Act, 2013 had been promulgated with effect from 5th July, 2013 (hereinafter referred to NFSA-2013) and in order to implement the provisions incorporated in the NFSA-2013, the Department's Memo No. 1478-FS/Sectt/Food/ 6F-5/85 Pt.I dated 13.04.1999 and 1246-FS/Food/Sectt/6F-02/03 dated 04.02.2004 in connection with declaration of vacancies for dealers and distributors appointments, de-tagging and re-tagging of distributors, wholesalers and dealers were hereby cancelled with immediate effect. The declaration of new vacancies and appointment of dealers and distributors, tagging of eligible beneficiaries under NFSA with fair price shops dealers, wholesalers and distributors shall be guided by the number of eligible beneficiaries selected in the local area, geographical location suiting convenience of the beneficiaries, remoteness and accessibility to the fair price shops and the distance travelled by the beneficiaries in keeping with compactness and homogeneity of the area and the fact remained that any Minutes of the Review Meeting held on 19.05.2018 at 2 P.M. at Khadya Bhawan, Kolkata, as well as guidelines for rationalization of ration card population of FPSs

under no circumstances could override such policy decision of the State dated 12.03.2015 and till date such policy decision was subsisting. Nowhere either in the Central Act or in the Central Control Orders as well as the State Control Orders, 2013 there was any right of getting minimum number of dealers in case of distributors and/or wholesalers to be tagged at the time of getting appointment of wholesalers as well as distributors in question likewise in case of dealers no right had been given in favour of the dealers at the time of getting their appointment as a licensee to have minimum number of consumers to be tagged with them in other words no vested right had been crystalized either in favour of the distributors as well as wholesalers or in favour of dealers to have minimum number of dealers to tagged with distributors/wholesalers and in case of dealer minimum number of ration card holders to be tagged with the dealer in question. The fact of creation on vested right as claimed by the writ petitioners in this purported writ petition was not at all true as the writ petitioners herein are a licensee only even if any de-tagging of such number of FPS dealers within the subject area pursuant to vacancy notice dated 01.09 2022 be made, such course of action regarding de-tagging could not be held to be arbitrary Above all the writ petitioners herein under no circumstances could challenge the Distributorship vacancy notice dated 01.09.2022 and such creation of Distributorship vacancy was purely within the domain of the administrative discretion of the Department and the Department i.e. the State of west Bengal has exercised their discretion regarding that in a fair and transparent manner and that too with the aid of Constitutional Scheme

including statutory provisions applicable in the facts and circumstances of this case and such creation of vacancy in conformity with the provisions incorporated in the NFSA-2013 and such creation of vacancies was done for smooth functioning of the targeted public distribution system taking into consideration of the ultimate beneficiaries of getting subsidized ration commodities and the same was related with public interest. There were two existing plenary legislation i.e. Essential Commodities Act, 1955 and the National 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 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 and such delegation of powers had been vested with the State Government as it would be evident from the Gazette Notification No. G.S.R. 800 dated June 9, 1978 published in Gazette of India, Part-II Section 3(1) dated 17.06.1978 and the Central Government Public Distribution System (Control) Order, 2001 as well as Central Government Public Distribution System (Control) Order, 2015 could not be equated with the delegation of power as envisaged in Section 5 of the Essential Commodities Act, 1955 and the fact remained that the G.B.R. 800 of the Ministry of Agriculture and Irrigation (Department of Food) till date had not been superseded by the Central Government and as such, the two existing separate Control orders of the State, one for rural areas and another for urban areas, were still

subsisting. 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. However, the said Central Control Order, 2015 by no means suggested that the delegations being made to the State Governments including the State of West Bengal by invoking Section 5 of the Essential Commodities Act, 1955 at the behest of the Central Government in insuing Gazette Notification No. a.S.R. 800 dated 09.06./1978 published in Gamette of India, Part-II, Section 3(1) dated 17.06.1978, had been obliterated and as such, the Kolkata Gazette Notification dated 12.04.2022 regarding appointment of Distributorship at the behest of the State respondents by dint of amendment as well the vacancy declaration notification dated 01.09.2022 for engagement of MR Distributorship of Reapara under Nandigram-II Block was treated to be a valid one. As per the provisions incorporated in the National Food Security Act (NFSA) the State Government had been bestowed upon with all the powers as envisage in sub-section (1) of Section 3 of the Essential Commodities Act so as to ensure excess 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. The State respondents 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 subordinate legislation and could not override the provisions contained in the plenary legislation, i.e. NFSA 2013. Above all the provisions incorporated in the Food Security (Assistance to the State. Governments) Rules, 2015 particularly Rule 5 of the said Rules, cast a duty upon the State Government including the State of West Bengal herein to take delivery of foodgrains under the targeted public distribution system from the designated depots, ensure its delivery through their authorized agencies upto the door step of fair price shops and to ensure its supply to entitled persons and households at prices specified in Schedule-I of the Act i.e. NFSA-2013. Therefore, the State amendment by dint of Kolkata Gazette Notification dated 12.04.2022 empowered the State authorities i.e. State of West Bengal to fulfill the duty cast upon the State Government with regard to declaration of vacancy of Distributorship and such declaration of vacancies of Distributorship was treated to be in terms of law and the State Government had got legislative power to make such amendment. The State Control Orders, 2013 were very much in existence in view of Section 24 of the General 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. From the aforesaid submissions the State Respondents were empowered to take recourse of the existing provisions of the State Control Orders, 2013.

4. I heard the learned counsels for the parties and perused the writ petition, the reports and the written notes of submissions.

5. The first contention of the petitioner that they had shifted their godown from Nandigram II Block to Nandigram I Block in 2016 incurring substantial expenses pursuant to a direction given and yet, the respondents declared a vacancy for Nandigram II Block soon thereafter is not borne out from records. The first Notification was issued on 05.07.2019. During pendency of the earlier writ petition the said Notification was cancelled resulting in disposal of the writ petition in 2019. Thereafter, it was only on 01.09.2022 that the impugned Notification was issued declaring vacancy from Nandigram II Block.

6. Declaration of new vacancy and appointments of dealers and distributors, tagging of eligible beneficiaries with the fair price shop dealers, whole sellers and distributors shall have to be guided by the number of eligible beneficiaries selected at the local area, the geographical location shooting convenience of the beneficiaries, the remoteness or accessibility to the fair price shop and the distance travelled by the beneficiaries in keeping with the compactness and homogeneity of the area. Under the relevant

Control Order and even in terms of the NFSA, 2013 the respondents shall be at liberty to hold periodic reviews of the situation and decide on the need to notify a new vacancy, among other things.

7. Even as regards clause 26 (ii) of the said Control Order, there is no material to indicate that the District Administration and District Controller Purba, Midnapore did not exercise powers in accordance with law and merely followed orders of higher authorities.

8. As has been rightly contented on behalf of the State respondents, neither the Central Act nor the Central Control Orders nor the State Control Orders give any right to obtain or retain a minimum number of dealers in case of distributors and/or whole sellers. There is no such vested right to hold or retain a minimum number of dealers in case of distributors/whole sellers or a minimum number of ration card holders in case of dealers. The respondent authorities are to consider the interest of the ultimate beneficiaries, which should be of paramount importance.

9. It is a fact that the petitioners were catering to two major blocks in the district. Although it is contended on behalf of the petitioner that there is perversity in mentioning the distance between the petitioner's godown and the Nandigram I Block, the respondents have been able to cite instances where fresh MR distributorship vacancy had been declared in some other areas on similar facts. Therefore, there is no caprice or arbitrariness in the whole exercise.

10. The contention of the respondents that certain provisions of the NFSA are yet to be implemented fully in the State and therefore, the State

respondents are empowered to take recourse to the existing provisions of the State Control Orders of 2013 is also noted. On this, a reference may be made to a judgment of a Division Bench of this Court passed in Sekh Abdul Majed versus State of West Bengal & Ors., 2022 SCC Online Cal 3030.

11. In view of the above discussions, I do not find any merit in the writ petition.

12. Accordingly, the writ petition is disposed of.

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

14. 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.)