

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**W.P.A. 23109 of 2023
Mohima Bibi & Anr.
versus
State of West Bengal & Ors.**

For the Petitioners	: Mr. Debabrata Saha Roy, Advocate Mr. Subhankar Das, Advocate Mr. Neil Basu, Advocate Mr. Sankha Biswas, Advocate
For the State	: Ms. Amrita Panja Moulick, Advocate
For the Ld. A.G.	: Mr. Sirsanya Bandopadhyay, Advocate Mr. Ritesh Kr. Ganguly, Advocate
Heard on	: 02.01.2024, 21.02.2024, 11.03.2024, 12.04.2024
Judgment on	: 25.09.2024

Bivas Pattanayak, J. :-

1. This writ petition has been preferred under Article 226 of the Constitution of India for declaring definition of '*family member(s)*' under Clause 2(m) and '*relative*' under Clause 2(xa) of West Bengal Public Distribution System (Maintenance & Control) Order, 2013 (hereinafter referred to as the 'Control Order, 2013') as *ultra vires* and for rescinding and/or cancelling the order dated 25th July, 2023 issued by Sub-Divisional Controller (Food & Supplies), Rampurhat disapproving the prayer of the petitioner no.1 for transfer of licence in favour of her brother i.e. petitioner no.2 on compassionate ground.

2. The brief fact of petitioner's case, in nutshell is as follows:

(i) The husband of petitioner no.1 namely Siayab Mondal, since deceased, was a Fair Price Shop cum kerosene oil dealer at village-Bhadiswar, P.O- & P.S- Murarai under Rampurhat subdivision in the district of Birbhum by dint of a license granted by the State authorities and he carried on such business with full satisfaction of the authorities.

(ii) The petitioner no.1, used to assist her husband for carrying on such business, as he suffered from various ailments. On the application of husband of petitioner no. 1, in the month of July 1995 made before the Sub-Divisional Controller (Food & Supplies), Rampurhat, the dealership licences were transferred in favour of petitioner no.1.

(iii) Since the death of her husband, the petitioner no.1, who is issueless, is residing with her brother, petitioner no.2, and is looked after by him. The business of petitioner no.1 is also being looked after by petitioner no.2 under the supervision of petitioner no.1. As per the Muslim Law petitioner no.2 is the only legal heir of his sister, petitioner no.1.

(iv) Several representations were made for incorporating petitioner no.2 and his son namely Imran Ali as partners in the said dealership business on the ground of medical incapacitation of the petitioner no.1. As no steps were taken by the State authorities, petitioner no.1 filed a writ petition being WPA 5267 of 2022 and direction was issued by the court for consideration of such representations. Pursuant to

the aforesaid direction, the said prayer of the petitioner no.1 was considered and rejected by the State authorities.

(v) Thereafter the petitioner no.1 also made prayer to transfer the dealership licences in favour of her brother, petitioner no.2 on the ground of medical incapacitation on 5th September, 2021. As no steps were taken by the State authorities, the petitioner no.1 filed another writ petition being WPA 2277 of 2023 and direction was issued by the court for considering such representation. Pursuant thereto such prayer of the petitioner no.1 for transferring dealership licences in favour of the petitioner no.2 was not approved by the State authorities on the ground that the petitioner no.2 was not included in the definition of '*family member(s)*' under Control Order 2013 vide its order dated 25th July, 2023.

(vi) The petitioner no.2 has no source of income of his own and his family is maintained from the meagre amount of income of dealership business of petitioner no.1.

(vii) In view of the aforesaid circumstances, challenging the order of disapproval for transfer of licence in favour of petitioner no.2, the petitioners have preferred the present writ petition.

3. The State respondents have contested the writ petition by filing affidavit-in-opposition precisely contending that the petitioner no.1 is a widow who got the aforesaid licences transferred in her favour during the life time of her husband, original licence holder, on compassionate ground. The petitioner no.1 intends to get the dealership licences transferred in the name of her brother, petitioner no.2 on compassionate ground for medical

incapacitation. However, the petitioner no.2 does not come within the ambit and definition of '*family member(s)*' as contained in Control Order, 2013. The scheme of compassionate appointment and transfer of dealership licences is a beneficial scheme to provide financial assistance to the legal heirs (family members) who has no other source of income rather than save the distressed family members of the deceased dealer. Though brother falls within the definition of '*relative*' but is included within the definition of '*family member(s)*' and as such petitioners are not entitled to relief as sought for in the writ petition. The State-respondents are bound to act in accordance with the provision and guidelines of the department and they have, accordingly, taken all adequate measures in accordance with law. The respondent-authorities at each level proceeded in compliance with definite Government Order and never had the intention to violate the principles of natural justice. There is no ground made out by the writ petitioners which require interference of the Hon'ble Court. In light of the aforesaid, it is prayed that the writ petition be dismissed in *limini*.

4. Mr. Debabrata Saha Roy, learned advocate appearing for the petitioners, at the outset, referring to definition of '*family member(s)*' under Clause 2(m) and definition of '*relative*' under Clause 2(xa) of the Control Order, 2013, submitted that while on one hand the prayer for transfer of dealership licences applied in favour of petitioner no.2 was disapproved on the ground that he is the brother of the licence holder petitioner no.1 which category is not included within the definition of '*family member(s)*' under Clause 2(m) whereas on the other hand, a brother having been included within the definition of '*relative*' under Clause 2(xa) is debarred

from applying or getting Fair Price Shop licence in his name as per Clause 20(iia) of Control Order, 2013, which clearly violates the right of petitioners protected under Article 14, 19(1)(g) and 21 of the Constitution of India.

He further indicated that this Court in writ petition being W.P.O. 449 of 2019 (*Anjana Modak versus State of West Bengal & Ors.*) extended the benefit by granting MR Dealership licence in favour of the married daughter and similarly, in another writ petition being W.P.A. No. 10630 of 2023 (*Md. Arob versus State of State of West Bengal & Ors.* order was passed for including the grandson within the definition of '*family member(s)*', and further in W.P.A. No. 11518 of 2021 (*Smt. Durga Das versus The State of West Bengal & Ors.*), direction was issued to include the brothers/sisters of licence holders who died bachelors and spinsters since they were not included within the definition of '*family member(s)*' under Clause 2(m). The definition of '*family member(s)*' under Clause 2(m) is not exhaustive and thus the Hon'ble Court extended the benefits to other category of persons who are not included within the definition of '*family member(s)*' under Clause 2(m).

If the policy framed by the Government is against any statute or the Constitution or runs contrary to the philosophy behind the provisions or if the same is dehors the provisions of the Act or legislations, the Court can interfere in the policy decision of the State. In support of his submission, he relied on the decision of Hon'ble Supreme Court passed in ***Brij Mohan***

Lal versus Union of India and Others¹. The appointment of a dealer on compassionate ground is in the nature of a beneficial legislation and, therefore, the benefit should be extended to the petitioner no.2, who is the brother of petitioner no.1.

In light of his aforesaid submissions, he prayed for setting aside the order dated 25th July, 2023 of the State authorities and further for declaring definition of '*family member(s)*' under Clause 2 (m) and '*relative*' under Clause 2(xa) of Control Order, 2013 as *ultra vires*.

5. In reply to the contentions raised on behalf of the petitioner, Mr. Sirsanya Bandopadhyay, learned Junior Standing Counsel appearing on behalf of the State-respondents submitted that the petitioner, by way of the present writ petition, has challenged the *vires* of Clause 2(m) and Clause 2(xa) of Control Order, 2013 precisely on the ground that Clause 20(iiiia) comes as a double jeopardy since as per Clause 2(m) the brother is not included in the definition of '*family member(s)*' so he cannot have the licence on compassionate ground and on the other hand the definition of '*relative*' under Clause 2(xa) which includes brother thereby debars him from making fresh application. Be that as it may, Clause 20(iiiia) has been included in Control Order, 2013 is to prevent cartelization and thus, the aforesaid provisions of Control Order, 2013 cannot be said to be discriminatory and violative of Article 14, 19 (1)(g) or Article 21 of the Constitution of India on such ground. For better functioning of the Public Distribution System, the scheme has been framed to extend the benefit equally to all persons and bearing in mind the same, the definition of

¹ (2012) 6 SCC 502

'family member(s)' has been incorporated. Moreover, compassionate appointment is not a matter of right. In support of his contention, he relied on the decision of this Court passed in ***Bhriguram Mahato versus State of West Bengal & Ors.***²

Entitlement of the dependents to claim engagement on compassionate ground has been made on the marital status of the licence holder which cannot be said to be unreasonable or unjust. A licence holder who is married, is normally expected to have spouse, son or a daughter and therefore they have been included in the definition of 'family member (s)' who may be dependent on the licence holder. Further brothers and sisters of bachelors and spinsters have been subsequently included on the ground that the unmarried persons cannot be expected to have spouse or son or daughter. In support of his contention, he relied on the decision of Hon'ble Bombay High Court passed in ***Vinod versus State of Maharashtra, through its Secretary and Others***³. Under the Scheme of the Government, all persons related to the dealer do not qualify. Therefore, only because the petitioner no.2 being the brother of the licence holder fails to qualify to have the transfer of licences in his favour on compassionate ground would not make such definition *ultra vires*.

Furthermore, until and unless it is found that the legislation is beyond the wisdom and rationality, the Court must keep its hand off. Nothing has been shown that the defining Clause of 'family member (s)' and 'relative' of Control Order, 2013 are irrational or arbitrary and, therefore, prayer for

² 2014 SCC OnLine Cal 14855

³ 2022 SCC OnLine Bom 7429

declaring such clause as *ultra vires* is unacceptable. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Maru Ram versus Union of India and Others***⁴. Referring to paragraph 104 of *Brij Mohan Lal (supra)*, he submitted that a challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds until and unless policy of the State is opposed to basic rule of law or statutory law in force.

In light of his aforesaid submissions, he prayed for dismissal of the aforesaid writ petition.

6. Upon hearing the learned advocates for respective parties, following issues have fallen for consideration:

- (i) Whether the exclusion of brother from the definition of '*family member(s)*' under Clause 2(m) and including him in the definition of '*relative*' under Clause 2(xa) of Control Order, 2013 affects the right of the petitioner protected under Article 14, 19(1)(g) and 21 of the Constitution of India and is therefore *ultra vires*?
- (ii) Whether the order dated 25th July, 2023 issued by Sub-Divisional Controller (Food & Supplies), Rampurhat disapproving the prayer of the petitioner no.1 for transfer of licences in favour of her brother i.e. petitioner no.2 on compassionate ground is sustainable?

7. Now let me proceed to decide the issues as aforementioned in the backdrop of available materials and the points of law as argued by the learned advocates of the respective parties.

⁴ (1981) 1 SCC 107

Issue No.1: Whether the exclusion of brother from the definition of ‘family member(s)’ under Clause 2(m) and including him in the definition of ‘relative’ under Clause 2(xa) of Control Order, 2013 affects the right of the petitioner protected under Article 14, 19(1)(g) and 21 of the Constitution of India and is therefore ultra vires?

8. In order to appreciate above issue, it would be profitable to reproduce the definition of ‘family member(s)’ under Clause 2(m) and the definition of ‘relative’ under Clause 2(xa) and Clause 20(iia) of the Control Order, 2013:

“2. Definitions.—

x x x

(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;

x x x

(xa) “relative” includes the family member and the following kin:

- (i) son’s spouse, son or daughter;
- (ii) daughter’s spouse, son or daughter;
- (iii) brother’s spouse, son or daughter;
- (iv) sister’s spouse, son or daughter;
- (v) parents brother or sister;
- (vi) spouse brother or sister;”

“20. Engagement of Dealer.—

x x x

(iia) Following person shall not be eligible to apply for a licence of a dealer, namely—

- a) a person holding a licence of dealer or distributor or wholesaler his name or a person whose relative already has a dealer or distributor or wholesaler licence;”

8.1. It is the contention of the petitioners that petitioner no.1 is the license holder, who is issueless and petitioner no.2 is the brother of the petitioner no.1, with whom she resides. It is also the contention of the petitioners that the petitioner no.2 has no source of income and dependent on the meagre income from the dealership business of the petitioner no.1. An application was submitted by petitioner no.1 before the concerned authority on 5th September, 2022 for transfer of dealership licenses in favour of her brother on compassionate ground due to medical incapacitation. Clause 20(vi) of Control Order, 2013 - *Engagement on compassionate grounds* - clearly provides that in case of death or in case of incapacitation on medical ground subject to satisfaction of the authority, of any existing dealer, prayer of any of the family members of the deceased/incapacitated dealer having no regular means of income, may be considered on compassionate ground. Thus, for appointment on compassionate ground the applicant has to fulfill twin conditions, *firstly*, he/she is a family member as per definition of '*family member(s)*' contained in Control order, 2013 and *secondly*, he/she has no regular source of income of their own. Upon bare reading of Clause 2(m) of Control Order, 2013, it manifest that the definition of '*family member(s)*' includes spouse, parents, son (including son legally adopted before death or incapacitation), widow of pre-deceased son, 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. However, it is found that the brother is not included within the definition of '*family member(s)*'. To avail the benefit under the compassionate

scheme, at the first instance, one has to come under the definition of '*family member(s)*'. The definition of '*family members (s)*' includes those categories of persons who are in proximate or immediate/close relations with the licence holder and whose likelihood of dependency may arise upon death or incapacitation of the licence holder. Only because a particular category of person is excluded from the definition of '*family member (s)*', cannot altogether make the definition *ultra vires* or in other words, makes it arbitrary or unreasonable. This court finds substance in the submissions of learned advocate for State-respondents that keeping in mind that a married person is expected to have spouse and children, the close proximate relations in consequence of such marriage has been included in the definition of '*family member(s)*'. In the present case, the petitioner no.1 (license holder) is issueless. However, her being issueless cannot have an adverse effect on the definition of '*family member (s)*' which is otherwise reasonably framed based on the marital status of a license holder.

8.2. The object underlying a provision for grant of compassionate appointment is to enable the family of the license holder to tide over sudden crisis due to death or incapacitation of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be in a position to survive. Compassionate schemes are floated by the Government to extend such privilege to the immediate dependents of the license holder to tide over the sudden crisis upon death or incapacitation of the license

holder, which cannot be questioned only because certain categories of the relatives are included within the definition of ‘family member(s)’ and others are excluded. The sole reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependents of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to overcome the sudden financial crisis. Further an appointment on compassionate ground is not a vested right as has been held by Hon’ble Supreme Court in ***State of West Bengal versus Debabrata Tiwari and Others***⁵. The underlying principles for appointment on compassionate ground are observed by the Hon’ble Supreme Court as follows:

“32. On consideration of the aforesaid decisions of this Court, the following principles emerge:

- i. That a provision for compassionate appointment makes a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions and must be resorted to only in order to achieve the stated objectives, i.e., to enable the family of the deceased to get over the sudden financial crisis.*
- ii. Appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis.*
- iii. Compassionate appointment is not a vested right which can be exercised at any time in future. Compassionate employment cannot be claimed or offered after a lapse of time and after the crisis is over.*
- iv. That compassionate appointment should be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.*

⁵ 2023 SCC OnLine SC 219

- v. *In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family, its liabilities, the terminal benefits if any, received by the family, the age, dependency and marital status of its members, together with the income from any other source.*”

8.3. This Court in *Bhriguram Mahato (supra)* has also observed that compassionate appointment upon death of a dealer is not a right but a privilege.

8.4. Thus, the petitioners cannot claim for transfer of licences in favour of petitioner no.2 as a matter of right. A scheme for compassionate appointment cannot include one and all categories of person/persons. Only person/persons in immediate/proximate relation, who are likely to face sudden financial crisis, are required to be included. It is pertinent to note that the definition of ‘family member(s)’ under Clause 2(m) includes those close relatives.

8.5. Referring to definition of Clause 2(xa) and Clause 20(iiiia) of Control Order, 2013, it has been strenuously argued on behalf of the petitioners that while on one hand the prayer for transfer of dealership licences in favour of petitioner no.2 is disapproved being the brother of the licence holder petitioner no.1, is not included within the definition of ‘family member(s)’ under Clause 2(m) whereas on the other hand, a brother is included within the definition of ‘relative’ under Clause 2(xa) and is debarred from applying or getting Fair Price Shop licence in his name as per Clause 20(iiiia) of Control Order, 2013, which clearly violates the right of petitioners protected under Article 14, 19(1)(g) and 21 of the Constitution of India. Although Clause 20(iiiia) of Control Order, 2013

debars a brother from applying in his individual capacity since he falls under definition of ‘relative’, yet such aspect cannot *ipso facto* lead to his entitlement of appointment on compassionate ground, since appointment on compassionate ground is a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment and is in the nature of an exception to the general provisions of appointment and must be resorted to only in order to achieve the stated objectives, i.e., to enable the family of the deceased to get over the sudden financial crisis. The Clause 20(iiiia) of Control Order, 2013 has been incorporated to prevent cartelization as has been rightly submitted on behalf of State-respondents.

8.6. In *Brij Mohan Lal (supra)*, the Hon’ble Supreme Court has held as follows:

“100. *Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:*

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

(II) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is dehors the provisions of the Act or legislations.

(VI) If the delegate has acted beyond its power of delegation.

x x x

104. *A challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds. Again, the scope of judicial review in such matters is a very limited one. One of the most important aspects in adjudicating such a*

matter is that the State policy should not be opposed to basic rule of law or the statutory law in force. This is what has been termed by the courts as the philosophy of law, which must be adhered to by valid policy decisions.”

8.7. In *Maru Ram (supra)*, the Hon’ble Supreme Court held as follows:

“41. Surely, arbitrary penal legislation will suffer a lethal blow under Article 14. But the main point here is whether Section 433-A harbours this extreme vice of arbitrariness or irrationality. We must remember that Parliament as legislative instrumentality, with the representatives of the people contributing their wisdom to its decisions, has title to an initial presumption of constitutionality. Unless one reaches far beyond unwisdom to absurdity, irrationality, colourability and the like, the court must keep its hands off.”

8.8. Bearing in mind the aforesaid principles and in view of the above discussion, it cannot be said that the definition of ‘family members’ and ‘relative’ contained in Clause 2(m) and 2(xa) of Control Order, 2013 is without any rationality or reasonability or is arbitrary or unfair. The aforesaid decision in *Brij Bhusan (supra)* also lays down that a State policy can be challenged only in very limited grounds when it is found that the same is opposed to basic rule of law or statutory law in force. There is nothing to show that the definitions are averse to basic rule of law or statute. Therefore, the submissions advanced on behalf of the petitioner that the definition under Clause 2(m) and Clause (2xa) of Control Order, 2013 is *ultra vires* does not hold good. Further since the appointment on compassionate ground is not a vested right, hence its disapproval on the ground recorded earlier cannot be said to violate Article 14, 19(1)(g) and 21 of the Constitution.

Issue No.2: Whether the order dated 25th July, 2023 issued by Sub-Divisional Controller (Food & Supplies), Rampurhat disapproving the prayer of the petitioner no.1 for transfer of licences in favour of her brother i.e. petitioner no.2 on compassionate ground is sustainable?

9. In view of the discussions made in foregoing paragraph, since petitioner no.2, brother of the license holder is not included within the definition of 'family member (s)' contained in Clause 2(m) of the Control Order, 2013, hence disapproving the prayer of the petitioner no.1 for transfer of licence in favour of her brother i.e. petitioner no.2 on compassionate ground by the authority concerned for such reason does not call for interference.

10. Before parting, let me now deal with the decisions of this Court relied upon by the petitioners.

(i) In W.P.A. No. 11518 of 2021 (*Smt. Durga Das versus The State of West Bengal & Ors.*), the father of the petitioner was a licensee in respect of a Fair Price Shop previously known as AR Shop. License was issued to her father in the year 1951. After the demise of her father the license was issued in favour of her mother, that is, in favour of the widow of the licensee in 1971. Due to the advanced age of her mother an application was made for transferring the license in favour of her brother, that is, the son of the licensee. License was issued in favour of the brother of the petitioner on 15th February, 2005 and since then the brother of the petitioner continued with the family business. The brother of the petitioner, that is, the licensee was a bachelor. He was a victim of Covid-19 and died on 1st October, 2020 leaving behind three unmarried sisters including the petitioner, two

married sisters and one unmarried brother as his heirs and legal representatives. The facts of the cited decision are distinguishable inasmuch as petitioner no.1, is a married woman and petitioner no.2 her brother who is also married and is having a separate family.

(ii) In WPA 10630 of 2023 (*Md. Arob versus State of State of West Bengal & Ors.*), the grandmother of the writ petitioner was running a fair price shop dealership by virtue of a licence issued by the authorities. The grandmother had four daughters and one son (petitioner's father) and all four daughters were married and were residing at their respective matrimonial homes whereas petitioner's father was living along with his family with the grandmother in the same house and the said fair price shop was the only source of livelihood for the whole family. The petitioner's father, Nura Ala, died during the lifetime of his mother on 02.11.2003, leaving behind his widow (petitioner's mother), one daughter (petitioner's sister) and two sons (including the petitioner). However, the mother of the petitioner remarried leaving the daughter and sons with their grandmother. The petitioner's grandmother brought up the eldest grandson, the writ petitioner, as her adopted son and the petitioner also remained with her as her adopted son. The petitioner's grandmother continued to survive with the children of her predeceased son through the income derived from the said dealership and married off her granddaughter. In the course of time, the petitioner started to assist the grandmother in the functioning of the dealership being the only source of livelihood for the family. The grandmother died on 03.05.2022, leaving behind

the petitioner and his younger brother as her survivors and her other legal heirs, being four married daughters and one married granddaughter. The facts of the cited decision is factually different from the present case at hand.

(iii) In W.P.O. 449 of 2019 (*Anjana Modak versus State of West Bengal & Ors.*), the married daughter of the deceased license holder was the applicant, which fact is also distinguishable from the case at hand.

- 11.** In light of the aforesaid discussion, the writ petition being no. **W.P.A. 23109 of 2023** stands dismissed.
- 12.** All connected applications, if any, stands dismissed.
- 13.** Interim orders, if any, stand vacated.
- 14.** Urgent photostat certified copy of the order, if applied for, be given to the parties upon compliance of all necessary legal formalities.

(Bivas Pattanayak, J.)